85-908

Supreme Court U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR,

Petitioners,

v.

FRANK HAYGOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT ERRED BY REFUSING TO APPLY PARRATT v. TAYLOR TO A CASE INVOLVING A NEGLIGENT INTERFERENCE WITH A LIBERTY INTEREST.

2. WHETHER THE NINTH CIRCUIT ERRED IN REJECTING PETITIONERS' CLAIM THAT THEY WERE PROTECTED FROM LIABILITY BY A QUALIFIED IMMUNITY.

3. WHETHER AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE.

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HAROLD CRANKE and BENJAMIN SEYMOUR Petitioners, v. FRANK HAYGOOD, Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners Harold Cranke, and Benjamin Seymour, respectfully pray that this Court issue a writ of certiorari to review the judgment and en banc opinion of the United States Court of Appeals for the Ninth Circuit in Haygood v. Younger, et al., No. 81-4686 which was filed on August 27, 1985.

OPINIONS BELOW

The en banc decision of the Ninth Circuit Court of Appeals is reported as Haygood v. Younger 769 F.2d 1350 (9th Cir. 1985). A copy of this opinion is attached to this petition as Appendix A. The panel opinion of the Ninth Grant Court of Appeals is reported as Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983). A copy of that opinion is attached to this petition as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on August 27, 1985. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period

prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eight Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom,or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Plaintiff/respondent Frank Haygood filed his complaint pursuant to 28 U.S.C. § 1983 on November 13, 1975. The complaint sought damages and declaratory relief against 16 defendants, including petitioners. A summons was issued the same day (CD).[1/]

On December 23, 1975, the defendants, including petitioners, filed a motion to dismiss. On April 13, 1976, the District Court issued an order which dismissed a number of defendants and a number of claims.

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1. "CD" refers to the Clerk's Docket entries in the United States District Court for the Eastern District of California for the various pleadings and orders in this case.

In response to an additional motion the District Court issued an order on March 21, 1978 dismissing additional portions of plaintiff's complaint.

On March 31, 1978, defendants Gunn, Wipf, Spangler and petitioners Cranke and Seymour answered (CD 24).

After more than six years of pretrial proceedings, jury trial finally began in this case in June of 1981. Only five of the original sixteen defendants remained in the case when it went to trial (CD 1).

After presentation of respondent Haygood's case, the District Court granted a motion for a nonsuit on behalf of three of the defendants (RT Vol. III, p. 501-506).

On June 9, 1981, the jury returned verdicts against petitioners, but respondent Haygood's recovery was limited to a total of $2,090.00 (CD 92-93).

After the verdicts were returned on June 9, 1981, respondent Haygood made an oral motion for additur, which was denied, as well as an oral and unsupported request for attorney's fees and costs. (RT Vol. III, p. 739-740).

On June 22, 1981, petitioners filed a timely motion for a judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure (CD 97).

On July 24, 1981, respondent filed a motion seeking $75,918.75 in attorney's fees (CD 100).

Respondent's belated opposition to the J.N.O.V. motion was filed on July 27, 1981 (CD 101).

On August 7, 1981, petitioners served a request for the production of documents on respondent Haygood's counsel in connection with his motion for attorney's fees (CD 108). On August 17, 1981

petitioners filed an opposition to the motion for attorney's fees (CD 117).

On November 30, 1981, the District Court issued two lengthy opinions. In its first opinion, which the court ordered published, the District Court denied petitioners' motion for a J.N.O.V. See Haygood v. Younger 527 F.Supp. 808 (E.D. Cal. 1981).

In its second opinion filed on November 30, 1981, the District Court awarded Haygood attorney and paralegal fees in the amount of $45,383.17.

Petitioners' appeal followed.

STATEMENT OF FACTS

The facts surrounding Respondent Haygood's claim for relief were not materially disputed but they are complex.

The evidence, viewed in the light most favorable to the respondent, supports the following factual summary.

The saga begins in 1946 when respondent Frank Haygood was convicted of escape and sentenced to state prison for a term not to exceed ten years. This was Mr. Haygood's "O" term; he was paroled on August 9, 1948 (RT Vol. II, p. 270).

In 1949 Mr. Haygood was convicted of five counts of forgery and was sentenced to concurrent terms of imprisonment of from one to fourteen years on each count. Those terms were aggregated and were designated plaintiff's "A" term.

Plaintiff's "A" term ran concurrent to his "O" term. Commencement of the "A" term began April 1, 1949. Mr. Haygood's "O" term was completely discharged on June 29, 1953 (RT Vol. II, p. 270-271).

After being paroled in 1956, plaintiff was convicted of carrying a concealed weapon and was sentenced to state prison for a term not to exceed five years.

This offense was designated plaintiff's "B" term and was concurrent to his earlier terms. It commenced on April 25, 1956[2/] (RT Vol. II, p. 271).

On or about December 21, 1958, Mr. Haygood escaped from custody while serving his "A" and "B" terms. While he was at large, he committed a robbery and was convicted on January 5, 1959. He was sentenced on the robbery conviction to an indeterminate life term which was designated his "C" term. Service on the "C" term began on January 8, 1959. The trial judge ordered the "C" term to run concurrently to previously imposed terms, which at that time were the "A" and "B" terms (RT Vol. II, p. 271).

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2. Haygood would therefore have served the maximum term on his "B" term on April 26, 1961 if his term had not been interrupted (RT Vol. II, p. 271).

Subsequently, on or about April 14, 1959, Haygood entered a guilty plea to a violation of the then existing provisions of Penal Code section 4531 (escape), and was sentenced to an indeterminate life term with a one-year minimum. In sentencing Haygood, the Humboldt County Superior Court orally recited that "he be committed to the state prison for the term prescribed by law, the sentence to run at the time he would otherwise have been discharged." This term was designated plaintiff's "D" term by the Department of Corrections (RT Vol. II, p. 271-272).

The abstract of judgment for Mr. Haygood's 1959 conviction, reflected the oral pronouncement of judgment. After printed language which read "It is ordered that the sentences shall be served in respect to one another as follows," a section intended to apply only to sentences on

multiple counts in the same judgment, the following typewritten entry appears: "Sentence to commence at the time said defendant would otherwise have been discharged." Following the printed entry "and in respect to any prior incompleted sentence(s) as follows" a typewritten entry states, "Same as above." The instructions on the printed form direct the court to enter there its ruling on whether the new term is to be "concurrent or consecutive to all incomplete sentences from other jurisdictions." (Def. Trial Exh. N.)

Respondent Haygood acknowledged that upon his return to prison at Vacaville in 1959 it was determined that his "D" term (escape) was consecutive not only to his "A" and "B" terms but also to his "C" term. Sixteen years later, the California Supreme Court would determine that his determination

was a "misinterpretation" of the 1959 escape judgment.

Mr. Haygood acknowledges that neither petitioner Seymour nor petitioner Cranke had anything to do with this aspect of the case (RT Vol. I, pp. 111, 218).

While in prison in San Luis Obispo Haygood appeared before the Adult Authority on October 8, 1970 for a parole hearing.

In conjunction with the granting of parole, a three-member panel of Adult Authority acted on October 8, 1970 to fix plaintiff's "C" term (robbery) at ten years and his "D" term (escape) at five-and-one-hal years. Respondent Haygood was given a final discharge date on all his terms of July 8, 1974. Because the October 8 action fixed the "C" term at less than the time already

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served, an "administrative discharge"[3/] of that term was recorded, effective retroactively to January 8, 1969. Although Haygood's prison records indicated that he had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961, respectively, the Adult Authority continued to refer to those terms in

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3. An "administrative discharge" was different from an actual discharge of a sentence. In order to be granted parole, an inmate had to be serving time on the sentence from which he was being paroled. Thus, if he was serving time on more than one sentence, which ran consecutive to one another, he could not be paroled until he actually started serving time on the last of his consecutive sentences. An "administrative discharge" allowed inmates to begin serving time on the last of their sentences while still permitting the Adult Authority to retain jurisdiction over the earlier terms (RT Vol. III, pp. 539-541; 556-557).

accordance with the "continuous term policy."[4/] (RT Vol. II, p. 272.)

Mr. Haygood was paroled on December 14, 1970. (Def. Trial Exh. N).

In January of 1972, Mr. Haygood was returned to San Quentin as a parole violator. He was again paroled on August 21, 1972 (Def. Trial Exh. N).

Subsequently, Haygood returned to prison in April of 1973, at which time the Adult Authority conducted a hearing and

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4. The "continuous term policy" refers t the provision that once a prisoner has received a sentence which is ordered to run consecutive to another term, none of the terms shall discharge until they all do. Thus, each of a prisoner's consecutive sentence are part of one single continuous term. Even though an inmate may have served all of this time on a particular sentence, it was still referred to in such situations because it continued to be a part of the whole. Referring to the terms did not mean that the Haygood served any more time in prison on these sentences (RT Vol. III, p. 521; Atty. Gen. Op. 51/162, Vol. 19, and Op. 56-59, Vol. 27).

revoked his parole and purported to refix his "C" and "D" terms at their maximum, which was life imprisonment (RT Vol. II, p. 272).

He was transferred to Folsom in December of 1973.

Soon after his arrival at Folsom, Mr. Haygood received a slip of paper from the Adult Authority notifying him of his legal status. Haygood said became upset with this form because he thought it indicated that he was still serving time on his "A" and "B" terms, as well as on his "C" term. Respondent also thought that the form indicated that he had not yet been credited with serving any time on his "D" term (RT Vol. II, p. 391).

Defendant Wipf was a Correctional Counselor I at Folsom State Prison.

Mr. Wipf met with respondent on at least five occasions and possibly more to discuss Mr. Haygood's concern about his

sentences. Mr. Wipf also discussed Haygood's concerns with petitioner Harold Cranke. Mr. Cranke was a Records Officer II at Folsom State Prison. (RT Vol. II, pp. 273-274).

On or about March 4, 1974, Mr. Haygood sent a letter to Mr. Cranke regarding his sentences. Mr. Cranke acknowledged receiving the letter. Mr. Cranke read the letter and then reviewed Haygood's prison central file, which included the legal status form, the cumulative case summary, the abstracts of judgment, and copies of the sentencing proceedings in respondent's case. Mr. Cranke determined that respondent's concerns about his sentence could best be answered by referring him to the continuous term policy which was set forth in two specific Attorney General's Opinions (RT Vol. III, pp. 588-590; 606; RT Vol. II, p. 274).

Defendant Joseph A. Spangler was the Administrative Officer of the California Adult Authority.

On March 8, 1974, Haygood sent a letter to Mr. Spangler. Mr. Seymour was directed to respond to the letter (RT Vol. II, pp. 274-275).

Petitioner Benjamin F. Seymour was a Records Officer III for the California Department of Corrections.

After receiving Haygood's letter dated March 8, 1974, Mr. Seymour reviewed Haygood's central file, including the cumulative case summary, legal status form, pertinent Attorney General opinions, and spoke with Mr. Cranke to confirm Mr. Haygood's legal status (RT Vol. III, pp. 612-614, 623-624; RT Vol. II, p. 275).

On April 1, 1974, Mr. Seymour sent a letter to Mr. Haygood answering the questions

which Mr. Haygood had asked about his sentences (Pl. Trial Exh. 9).

Respondent was not satisfied with either Mr. Cranke's or Mr. Seymour responses and on July 25, 1974, Mr. Haygood filed a pro per petition for a writ of habeas corpus in the California Supreme Court (Pl. Trial Exh. 15).

On August 8, 1974, an attorney was appointed to represent plaintiff in that habeas corpus action (RT Vol. II, p. 359).

On August 9, 1974, a return to the order to show cause was filed by the Warden of Folsom Prison denying the allegations of the petition.

On October 17, 1974, an amended petition was filed by the attorney representing Mr. Haygood, and on February 24, 1975, a supplemental return was filed (RT Vol. II, p. 360).

The question of the actual relationship between plaintiff's "C" and "D" terms was raised for the first time in this amended petition (RT Vol. II, p. 361).

In the case of In re Haygood (1975) 14 Cal.3d 801, the California Supreme Court determined that the Adult Authority's 1970 decision refixing Mr. Haygood's terms was erroneous and accepted Haygood's supplemental contention that the "D" term was consecutive only to the "A" and "B terms and was concurrent with the "C" term. The California Supreme Court therefore concluded that respondent's "C" term had expired on January 8, 1969 as a result of the Adult Authority's action, of October 8, 1970 fixing it at ten years. Based on the same action fixing the "D" term at five-and-one-half years, the "D" term was held to have expired in late 1968 because it commenced from the date respondent would otherwise have been

discharged from the "A" and "B" terms (which were the terms he was serving at the time of his escape). In essence, therefore, the Supreme Court reasoned that the Adult Authority's actions on October 8, 1970 effectively terminated all of Mr. Haygood's terms and he was entitled to be released by writ of habeas corpus (RT Vol. II, p. 361).

Respondent does not dispute the fact that he did not question the relationship between his "D" and "C" terms in any of the letters he sent to petitioners Cranke and Seymour in this action (RT Vol. II, p. 361, lines 13-15; lines 22-25; p. 362, lines 16-23)

Mr. Gaskill (a fellow inmate who advised Haygood) admitted that "the theory under which we went under [in the letters] was different than the theory the [California] Supreme Court rendered their opinion on." (RT Vol. II, p. 362.) Mr. Gaskill also admitted that "It was <u>just</u>

happenstance that the other attorney came up with the issue in which the Court rendered its decision on." (RT Vol. II, p. 362; emphasis added.)

In fact, Mr. Gaskill admitted that at the time when Mr. Haygood sent his letters to the prison officials, defendants, "No one knew" that the "D" term should not have been running consecutive to the "C" term (RT Vol. II, p. 364, Emphasis added).

The decision of the California Supreme Court in In re Haygood, supra, was not unanimous. At least one of the justices on the California Supreme Court felt that there was no error in the computation of Mr. Haygood's terms and that he was not entitled to be released from prison.

The above stated facts were undisputed prior to trial and remained that way after the trial. The only factual dispute in this case arose over the scope and

adequacy of the investigation undertaken by petitioners Cranke and Seymour in responding to respondent Haygood's letters.

REASONS FOR GRANTING THE PETITION

The long-awaited decision of the Ninth Circuit in this case was anticipated to resolve the question of whether Parratt v. Taylor, 451 U.S. 527 (1981) applies to due process claims involving liberty interests. The three-judge panel in Haygood had ruled that Parratt applies to liberty interests as well as property interests for purposes of a due process analysis.

Rather than follow the panel decision, a unanimous en banc panel instead ruled that Parratt was inapplicable under the circumstances presented in the instant case. By mistakenly concluding that Haygood's excessive incarceration was the result of "an established state procedure", the en banc

Court found that Haygood was denied his right to a pre-deprivation hearing under Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The en banc Court also refused to accord petitoners the qualified immunity recognized in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The implications of the Haygood decision are potentially profound. Although the Ninth Circuit fell short of declaring that Parratt can not be applied to liberty interests, the dicta in the opinion clearly indicates that the Ninth Circuit views Parratt as applying only in a "narrowly limited class of cases." (769 F.2d at 1357)

In so holding, the Ninth Circuit has misperceived the import of Parratt and due process requirements in general. Indeed, the opinion reads as though the Court was attempting to find some rationale to support a predetermined result.

To reach this result and avoid the conclusion reached by the panel decision, the en banc court had to change the facts of the instant case to fit within Logan. To utilize Logan the en banc decision had to characterize the deprivation in this case as resulting from an "established state procedure." Such an analysis is both legally and factually incorrect.

In sharp contrast to Logan, it was the California Supreme Court's decision in Haygood which found that the complex web of sentencing statutes should properly be interpreted in a manner different from that utilized by petitioners. Thus, the California Supreme Court announced the proper method for computing Haygood's sentence for the first time. Petitioners merely misunderstood what even the Ninth Circuit conceded were complex statutes. This action could be considered no more than simple

negligence. Legions of cases establish that there is no constitutional right to error-free state action.

Even if analysis under Logan were proper, the Court of Appeal failed to consider all of the factors enunciated under that ruling. Under both Logan and Parratt, due process requirements are premised in part upon the burden that pre-deprivation process would impose upon the public entity and the practicality of such process. In the instant case, both factors mitigate against the pre-deprivation hearings now required by the en banc decision.

There is little or no doubt that a majority of California's prison inmates are unhappy about their confinement in one respect or another. The Haygood decision will now require some type of formal administrative hearing any time one of California's 40+ thousand inmates raise a

complaint concerning some aspect of their sentencing or confinement. This will place an intolerable fiscal and administrative burden on both state and local detention facilities that are already taxed beyond their capacities.

The Ninth Circuit decision ignores the vitality of Parratt in the civil rights area. This Court has made it clear that it views Parratt as a valuable tool to limit the ever-expanding range of cases filed under Section 1983. In Hudson v. Palmer, 104 S.Ct. 3194 (1984) for example, all nine justices agreed that Parratt extends to intentional conduct as well as negligent acts by state officials. The Ninth Circuit's decision in Haygood is precedent which will re-establish the federal courts in the ever-expanding business of trying ordinary tort cases.

I

THE NINTH CIRCUIT HAS CLEARLY ERRED BY REFUSING TO APPLY PARRATT V. TAYLOR TO A CASE INVOLVING NEGLIGENT INTERFERENCE WITH A LIBERTY INTEREST.

Petitioners contend that certiorari must be granted since the Ninth Circuit has clearly erred by refusing to apply this Court's holding in Parratt v. Taylor, 451 U.S. 527 (1981) to a situation involving the negligent deprivation of a liberty interest.

After six years of pretrial proceedings the sole claim presented to the jury in this case was whether petitioners had negligently violated plaintiff's due process rights by failing to adequately investigate his complaints concerning the computation of his sentence. Both the district court and the original panel decision of the Ninth Circuit understood this basic aspect of the case. The en banc court saw the case differently and instead held that petitioners

had acted pursuant to an established state policy. This finding is both crucial and erroneous.

A. The Ninth Circuit Mistakenly Found That Petitioners Had Acted Pursuant To An Established State Policy.

Contrary to the original panel decision which recognized that the gravamen of plaintiff's due process claim was the alleged inadequacy of petitioners' investigation of the complaints Haygood made concerning the computation of his sentence, the en banc Court instead held tha petitioners had acted pursuant to an established state procedure and had refused to afford plaintiff a pre-deprivation hearin in responding to his complaints about his sentence.

The en banc court made this abrupt change, in a rush to apply Logan v.

Zimmerman Brush Co., 455 U.S. 422, 435-437 (1982), to the instant case.

A finding that petitioners had acted pursuant to an established state policy is not supported by the record; is contrary to the findings made by earlier panel decision; ignores an unchallenged ruling of the District Court; and creates unnecessary Eleventh Amendment problems.[5/]

Unraveling the crucial question of whether petitioners acted pursuant to an established state policy or negligence requires an analysis of the events which led to Haygood's release from prison.

A close reading of the California Supreme Court's decision in In re Haygood,

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5. A finding that this case involves an established state policy creates liability for the state as an entity rather than for petitioners as individuals. An award of money damages against the state is expressly prohibited by the Eleventh Amendment. Edleman v. Jordan 415 U.S. 651 (1974).

supra, discloses that respondent was release from prison because prison officials had improperly determined in 1959 that his "D" term was consecutive to "C" term, as well as being consecutive to his "A" and "B" terms.

The California Supreme Court held that Haygood's "D" term was running consecutive to his "A" and "B" terms, but that his "D" term was concurrent with his "C" term. The facts are undisputed that the relationship between Haygood's "C" and "D" terms was originally established in 1959 when he returned to prison following his escape conviction. Neither petitioner played any part in the 1959 decision to run Haygood's "D" term conviction to both his "C" term and to his "A" and "B" terms. It is equally true that this error went unchallenged for more than 15 years.

Haygood did not begin to complain about his sentence until December of 1973

after he had been notified that his "C" and "D" terms had been refixed at life following a parole revocation hearing before the Adult Authority. Haygood then sent a number of letters to various prison officials including his correctional counselor, the Warden and petitioners Cranke and Seymour. All of Mr. Haygood's letters were investigated and answered in writing. At one point Haygood sent Mr. Cranke a fill-in-the-blanks letter which Mr. Cranke researched and answered.

It was uncontested that Haygood never asked petitioners any questions about the relationship between his "C' and "D" terms. Haygood was not satisfied with the responses he received and filed a pro per petition for a writ of habeas corpus with the California Supreme Court.

Even then Haygood did not complain that his "D" term should not be running consecutive to his "C" term as well as to his

"A" and "B" terms. Instead, Haygood simply challenged California's continuous term policy.

The actual problem with Haygood's sentence did not surface until an attorney was appointed to represent him in the California Supreme Court. Haygood was eventually released because of this newly discovered error.

When he filed his section 1983 action, plaintiff's claim for relief was directed at petitioners' negligence in failing to discover the error which was made in 1959. Simply stated, Haygood alleged that the two records officers were negligent in failing to uncover the true relationship between his "C" and "D" terms.

The Ninth Circuit appears to have confused California's 'continuous term policy' with an established state procedure which caused Haygood's unlawful confinement.

Application of the continuous term policy to Haygood's case did not cause Mr. Haygood to be confined too long.

In granting defendants motion to dismiss for failure to state a claim, the District Court specifically held that application of the continuous term policy to Haygood's sentence did not violate plaintiff's due process rights and therefore did not state a claim for relief. (CD 19, Order 1/5/78, p. 6-9). Respondent Haygood did not appeal the District Court's ruling that he was not harmed by application of the continuous term policy to his case.

B. Parratt v. Taylor Applies To Negligent Deprivations Of A Liberty Interest.

In Parratt v. Taylor, supra, this Court held that Nebraska's tort remedies for wrongful loss of a prisoner's hobby kit satisfied the due process requirement of the Federal Constitution.

Parratt v. Taylor, however, involve a deprivation of property -- not liberty. Circuit Courts are now in disarrary on the question of whether Parratt applies to deprivations of liberty interests and this court has decided to review the issue. Certorari has been granted in at least two cases which raise this precise issue. Compare Daniels v. Williams, 748 F.2d 229 (4th Cir. 1983) cert. granted 2/19/85 in No. 84-5872 and Davidson v. O'Lone 752 F.2d 817 (3rd Cir. 1984) cert. granted 6/3/85 in No. 84-6470; with Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982).

There are even conflicting authorities within the Ninth Circuit on this important issue. Thus, in Board of Regents 660 F.2d 1345, 1352 (9th Cir. 1981) (aff'd o other grounds sub nom. Kush v. Rutledge, 10 S.Ct. 1483 (1983)) the court held that Parratt applies and that there was no due

process violation. In Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1741 (1983) another Ninth Circuit panel held that Parratt does not apply and that a section 1983 cause of action is available.

The Ninth Circuit refused to apply Parratt to the facts of the Wakinekona case and in so doing pointed out that Justice Blackmun's concurrence, which Justice White endorsed, limited Parratt to property interests. See 451 U.S. at 545. However, such a limitation appeared neither in the Court's opinion, which commanded five votes in addition to those of Justices White and Blackmun, nor in Justice Stewart's concurring opinion. Furthermore, Justice Blackmun provided no rationale for the limitation he suggested. Nor did the Wakinekona court, which simply pronounced that cases "dealing with a liberty interest [are] of a wholly

different nature" than those involving property. 664 F.2d at 715.

The Fifth Circuit, which also refused to apply Parratt to liberty interests, relied on the narrow reading given to that case in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt. 692 F.2d at 394-95; see 455 U.S. at 436.

Logan, however, presents an issue different from that involved in the instant case. In Logan, a charge was filed with the Illinois Fair Employment Practices Commissio alleging that an employer had wrongfully discharged Logan because of his physical handicap. At the time, the Illinois fair employment statute required that the Commission hold a factfinding conference within 120 days, which it failed to do for reasons beyond Logan's and his employer's

control. The Illinois Supreme Court held that the Commission's failure to convene the statutorily mandated conference in a timely manner deprived the Commission of jurisdiction and extinguished Logan's cause of action. It rejected his due process and equal protection arguments, finding that the procedures established by the statute were reasonable.

This Court reversed and concluded that due process required that:

> "[T]he Commission consider the merits of [Logan's] charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim . . . . A system or procedure that deprives persons of their claims in a random manner, as is apparently true of [the Illinois statute], necessarily presents an

unjustifiably high risk that meritorious claims will be terminated." (455 U.S. at 434-35.)

In Logan, this Court distinguished Parratt because Logan challenged "the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." Id. at 436. Logan's complaint was directed to a systemic procedural deficiency, not an unexpected or unperceived error. While the decision in Logan cited Justice Blackmun's concurrence in Parratt to support its position, nothing in the holding or analysis of Logan requires this Court to undermine Parratt by refusing to apply it to a negligent interference with a liberty interest.

The statute at issue in Logan was found to be deficient because it provided inadequate pre-deprivation process under circumstances in which such process was

feasible. It provides no guidance with respect to situations in which pre-deprivation process is not feasible.

Neither can it be argued that applying Parratt's reasoning to liberty interests would revive the requirement, rejected at least since Monroe v. Pape, 365 U.S. 167 (1961), that a section 1983 plaintiff must first exhaust state remedies. See 527 F.Supp. at 815. Such is clearly not the case. This objection amounts to a rejection of the reasoning of Parratt and has no greater force with regard to a liberty interest than to a property interest. Such a claim misperceives Parratt's rationale by confusing the rights accorded by the Fourteenth Amendment's due process clause with the remedy afforded by section 1983. The holding in Parratt did not deny the inmate a remedy; it defined his rights. The decision in Parratt does not require that

state remedies be exhausted. Instead, this Court held that no constitutional violation occurred and that resort to federal court i situations encompassed by its rationale is foreclosed.

Parratt must therefore be applied t situations in which process prior to the deprivation of a liberty interest would not be feasible or practicable. Where the deprivation is based on negligence, pre-deprivation due process is both in impractible and unfeasible. In such cases, it is the adequacy of the state's post-deprivation process which must be examined. In this context, distinctions between deprivations of property and those o liberty are of no legal moment.

The Ninth Circuit ignored this position, and focused instead on the rights guaranteed Haygood rather than the process available to him. The Ninth Circuit reasone

that since the state had lawfully confined Haygood without conducting a hearing, his due process rights had been violated.

This analysis if fatally flawed. It makes the deprivation itself the denial of due process. Such an analysis amounts to holding as a matter of law that a deprivation of liberty, i.e., a wrongful incarceration, is a per se violation of the Fourteenth Amendment without regard to whether the available process was adequate or inadequate, pre-deprivation or post-deprivation. That must not be allowed to become the law. The Fourteenth Amendment protects only against deprivations without due process of law. See Parratt, 451 U.S. at 537; Baker, 443 U.S. at 145. Section 1983 does not provide a cause of action for every tortious, wrongful or improper deprivation of either liberty or property by a state without regard to the process by which it is accomplished. The

Civil Rights Act is not an insurance policy against mistakes being made by persons acti under the color of state law. It only protects against mistakes being made in the absence of "due process."

C. Plaintiff Was Afforded Adequate Process.

It remains to be determined whethe the process accorded Mr. Haygood meets the constitutional standard of "due process." I the present case, Haygood was accorded substantial, but not mistake free, "process which commenced shortly after the date on which it was later determined that he shoul have been released. Thus, on October 8, 1970, Mr. Haygood had a hearing before the Adult Authority which fixed both his "C" ar "D" terms and set a parole date of December 14, 1970. As already pointed out, had plaintiff not violated his parole all o these terms would have discharged on July 8

1974. However, he twice violated his parole and it was finally revoked on December 13, 1973 following another hearing. Thereafter, plaintiff began writing letters to the defendants complaining about his sentence.

In these letters plaintiff insisted that he, in some fashion or other, was being required to serve more time than his sentences required. Petitioners answered each of Haygood's letters in writing as well as interviewing him. This, too, was a part of the "process" afforded plaintiff by the State of California. Additional "process" was provided by way of the habeas corpus proceedings which, unlike the earlier "process" Haygood received, achieved the result he sought -- his release from prison. Finally, a remedy under state tort law existed but Haygood failed to file a timely claim and forfeited this "process."

The panel decision found this arra of "process" to be sufficient to meet the constitutional requirement of due process.

Arguably, the "process" which Haygood received can be said to have commenced before the deprivation of his liberty and to have continued thereafter. any event, it was a continuous process that was responsive to the rules of the Adult Authority as the officials then understood them, as well as to Haygood's numerous complaints. When these facts are realized, the true nature of this case becomes clear. It is simply an instance in which the prope authorities understood California law regarding indeterminate sentences in a fashion subsequently determined to be incorrect by the State Supreme Court on a six-to-one vote. None of Mr. Haygood's liberty interests were stripped from him without due process. Scrupulous care was

taken to insure that he received all available process. That which was utilized post-deprivation was not feasible before the deprivation. The fact that the process was lengthy does not make it constitutionally inadequate in this setting, nor does the fact that relief awaited a decision by the state court of last resort. In the words of Judge Sneed "arguing that processes that ultimately vindicated the claim asserted are constitutionally deficient is surprising, if not perverse."

* * * * *

II

THE NINTH CIRCUIT ERRED IN REJECTING PETITIONER'S CLAIM THAT THEY WERE PROTECTED FROM LIABILITY BY A QUALIFIED IMMUNITY.

Prior to trial, petitioners filed number of motions, both to dismiss and for summary judgment alleging that they were protected by a qualified immunity. The district court repeatedly rejected this argument and treated the issue as a questio of fact rather than as a legal issue. With only a cursory analysis of this important issue, the en banc decision of the Ninth Circuit rejected petitioners' claim that th were protected by a qualified immunity as a matter of law.

The Ninth Circuit's en banc opinio ignores the teaching of this Court in Harlo v. Fitzerald 457 U.S. 800 (1982) that good faith is an objective determination that mo often is a question of law, not fact.

Harlow, supra also instructs that individual liability will not attach under section 1983 unless the individual acts to deprive the prisoner of a "clearly established" constitutional right. Given that Mr. Haygood's "liberty" interest was not defined until the California Supreme Court unraveled his complex sentencing quagmire, it defies logic and law to assert that Haygood's right to an earlier release was clearly established.

Under Davis v. Scherer, 468 U.S. ____, 104 S.Ct. 3012 (1984) petitioners enjoy a qualified immunity unless, at the time Mr. Haygood complained to them about his sentence it was "clearly established" that his sentence had been miscalculated. The standard is objective and is appropriate for summary disposition by a trial judge. Harlow v. Fitzgerald, supra. This Court has stated that it views the "objective reasonableness

of [the] official's conduct as measured by reference to clearly established law." Davis, 468 U.S. at ____, 104 S.Ct. at 3018 (quoting Harlow, 457 U.S. at 818, 102 S.Ct. at 2738).

The Ninth Circuit, however, merged the question of "deliberate indifference" with the question of whether a right is "clearly established" for qualified immunity purposes. This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law to a factual inquiry for the jury.

There is no definitive guide as to when a right is "clearly established". Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983). This Court has indicated that a high standard should be applied in prison cases such as this. In Davis, the Court recognized that prison officials

routinely make close decisions and that they "should not err always on the side of caution." Davis, 468 U.S. at ____, 104 S.Ct. at 3021. Those persons "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." Id.

In the instant case, the lower courts have stripped these two prison officials of their right to a qualified immunity in violation of established precedent. In the event this Court approves of the Ninth Circuit's interpretation of Parratt and reaches the immunity issue, it nevertheless should grant review and reverse the en banc circuit court decision to rectify this clear error.

The Ninth Circuit appears to have concluded that a jury's finding that prison officials violated an inmate's due process and Eighth Amendment rights necessarily would

negate any claim that the officers acted in good faith and were entitled to a qualified immunity. In a similar case which is presently before this court on certiorari, the Ninth Circuit has held:

> The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" Haygood v. Younger, 718 F.2d at 1483-84. See Miller v. Solem, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would violate a right "clearly established at the time of the conduct at issue." Davis v. Scherer, 468 U.S. ____, ____, 104

S.Ct. 3012, 3021, 82 L.Ed. 139 (1984). Albers v. Whitley, 743 F.2d at 1376 cert. granted 6/10/85 in No. 84-1077.

The principal flaw in this reasoning, of course, is that the prison officials did not have the benefit of the California Supreme Court's 1975 ruling when they acted upon Haygood's complaints in 1974.

In Procunier v. Navarette, 434 U.S. at 565, this Court ruled that a claim of qualified, "good faith" immunity by prison officials could not be rejected as a matter of law, "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. . . ." Drawing on this precedent, the Court stated in Harlow v. Fitzgerald, 457 U.S. at 818, that "government officials are shielded from liability for civil damages

insofar as their conduct does not violate violate clearly established statutory or constitutional rights of which a reasonable person would have known." As this Court explained,

> [i]f the law at [the time an action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

Ibid.

Furthermore, the good faith defens available to each petitioner does not distinguish between mistakes of law and tho of fact (Benson v. Hightower (9th Cir. 1980 633 F.2d 869).

In analyzing the availability of t qualified immunity defense, the Ninth Circu

failed to focus on whether, in the context of responding to an inmate's complaints about his sentence, prisoners had a clearly established constitutional right to receive an administrative hearing on their complaint concerning their sentence. Assuming for the sake of argument that the Ninth Circuit correctly concluded that petitioners failed to adequately investigate Haygood's complaints by not affording Haygood a hearing, this requirement was not clearly established when the two records officers responded to Mr. Haygood's complaints in this case. Until the Ninth Circuit's decision in this case, no other circuit court had enunciated a rule requiring due process hearings for prisoner complaints about their sentences.

* * * * *

III

THE NINTH CIRCUIT ERRED IN IGNORING PETITIONERS ARGUMENT THAT ANY AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE, AND THAT THE ATTORNEY'S FEE CLAIM IN THIS CASE IS EXCESSIVE.

It is petitioners contention that certiorari must also be granted in this cas to review the important question of whether awards of attorney's fees under 42 U.S.C. § 1988 must be proportionate to the jury's verdict in order to be reasoanble. It is petitioners contention that an award of mor than $45,000.00 in fees for a $2,000.00 judgment is inherently reasonable since it grossly disproportionate to the jury's verdict.

In the instant case, plaintiff originally named 16 defendants and alleged approximately 19 separate causes of action.

After six years of pretrial proceedings, only five defendants remained. Defendants were successful in obtaining either summary judgments or outright dismissals with respect to all but two of plaintiff's claims.

At trial, three defendants were granted a non-suit and the jury eventually awarded plaintiff a meager $1,450.00 in general damages against one defendant and $640.00 against another.

Plaintiff then filed a request for attorney's fees in the amount of $57,731.25 and paralegal fees of $18,187.50 for a total requested award of $75,918.75.

In awarding plaintiff more than $45,000.00 in fees, the district court applied the 12 factors set forth in Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978). One of the factors evaluated by the court was the total number of hours expended on the case.

Here, plaintiff's attorney asked to be compensated for all of the 728.75 hours he spent on the case from 1975 until 1981. Th district court found this request to be reasonable and only reduced the number of hours by 10% to compensate for counsel's inappropriate method of keeping records.

Over petitioners' objections, the District Court compensated Mr. Haygood for all of the time his counsel spent on the case, even for the time spent opposing the summary judgments and dismissals which were granted for 11 out of the original 16 defendants, and for 17 of the 19 original claims.

Because of counsel's ineffectiveness, the district court further held that "the skill displayed by counsel, most importantly the amount and the result obtained by counsel would in themselves lea me to reduce the loadstar figure by 65%.

However, the District Court also increased the award by 35% because of the novelty and difficulty of the issues and because of the protracted nature of the litigation. These computations led to a net 30% reduction of the fee request. However, the total award of $45,383.17 was never analyzed to determine whether it was proportionate to the result obtained.[6/]

It is petitioners' contention that unless this Court intends to allow section 1988 to become the tail that wags the dog, there must be a requirement of proportionality between the amount of the judgment and the amount of attorney's fees awarded in such cases.

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6. In supplemental requests for attorneys fees filed in the North Circuit and in the District Court, respondent is seeking an additional $13,303.00 which, if granted, would escalate the award in this case to $58,686.17.

The instant case was and continues to be basically a tort action for money damages. The gravamen of plaintiff's complaint was that petitioners were negligent in their investigation of his complaints concerning his sentence. There was no declaratory relief nor was there any injunctive relief. The case did not establish any significant precedent in the area of California sentencing law. The only notoriety the case has achieved resulted from the district court's refusal to apply Parratt to plaintiff's due process claim.

This Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983) was a step in the direction of requiring that attorney's fees be proportional to the judgment in money damage cases. In Hensley this Court remanded the case back to the district court with orders that the lower court reconsider the amount of the attorney's fee award in light

of the extent of success achieved by the plaintiffs.

In Hensley, this Court acknowledged that section 1988 was enacted "to ensure effective access to the judicial process for persons with civil rights grievances." Hensley v. Eckerhart, supra, at 429. Similarly the legislative history which led to the enactment of section 1988 evidences a clear intent that the section was not meant to produce awards which were so large as to produce windfalls to attorneys S. Rep. No. 94-1011, p. 6 (1976), H.R. Rep. No. 94-1558, p. 9 (1976).

The rationale behind the Hensley decision was not applied to the instant case. Instead, the district court applied the criteria set forth in Fountila v. Carter, supra, without ever taking an overall look to see if the award was proportional to the judgment.

Even, Hensley, however, did not go far enough. Thus, Justice Rehnquist has observed in his in-chambers opinion in City of Riverside v. Rivera that:

> This Court has already recognized that "[t]he product of reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, supra, at 434. Similarly, in Blum v. Stenson, ____ U.S. ____, 104 S.Ct. 1541 (1984), we explained that "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or

unreasonably high." Id. at ____, 104 S.Ct. at 1548. Neither Hensley nor Blum, however, addressed whether disproportionality between the amount of the monetary judgment obtained and the amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee. In-chambers opn. J. Rehnquist, City of Riverside v. Rivera, 106 S.Ct. 5 (1985).

The fees awarded in the instant case are even more shocking than those awarded in City of Riverside v. Rivera, supra.

Thus, in its 1984 report to Congress, entitled "Civil Rights Attorney's Fees Awards Act of 1976, the National Association of Attorneys' General (hereinafter NAAG Rpt.) singled out the instant case and Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982), as

examples of situations where an attorney's fee award was "grossly disproportionate to the degree of success" obtained by the plaintiff. In comparing the two awards, the NAAG Report found the instant case to be "an even more extreme example of a court's failure to proportion a fee award to the degree of success obtained. . . ." (NAAG Rpt., p. 19.)

Petitioners have raised the disproportionality issue at every stage of the proceedings. For example, petitioners opposed plaintiff's original request for fees as disporportionate to judgment.

Citing Larson, Federal Court Awards of Attorney Fees, 1981, p. 121, and Manhart v. City of Los Angeles (9th Cir. 1981) 652 F.2d 904, 907, the district court rejected petitioners' argument and held that "as a general matter, a low monetary recovery is

irrelevant to the proper computation of fee awards." (Order, 3/25/82, p. 5.)

The issue was then raised in petitioners' appeal to the Ninth Circuit and was also argued to the en banc panel. The en banc decision of the Ninth Circuit totally ignored this important issue.

If a proportionality requirement is not imposed, this Court's recent holding in Kentucky v. Graham, ___ U.S. ____ (1985) could have devastating consequences for public employees who are not protected either by insurance or by an indemnification provision such as California Government Code section 825.[7/]

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7. Petitioners Cranke and Seymour are protected by the indemnification provisions of California Government Code section 825. There are, however, no funds appropriated to satify attorneys' fee claims in California. Collection of this and other section 1988 awards could well depend in the first instance on the cumbersome and cruel process of executing against the personal assets of these two state employees.

Section 1988 was not intended to be a license for the federal courts to raid state treasuries or bankrupt state employees. This is why the Congress limited the fees which may be awarded to those which are reasonable. It is petitioners' contention that in order to be reasonable, fees must be proportionate to the recovery which plaintiff secured and that when the fees awarded are totally out of proportion to the jury's verdict, the award is inherently unreasonable.

* * * * *

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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WGP:jsi

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK HAYGOOD,	)	DC No.
	)	CV-S-75-738-LKK
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
EVELLE J. YOUNGER, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
HAROLD CRANKE and	)	O P I N I O N
BENJAMIN SEYMOUR,	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court for the Eastern District of California, Lawrence K. Karlton, Jr., District Judge, Presiding
Argued en banc and submitted July 11, 1984

Before: BROWNING, Chief Judge, and GOODWIN, HUG, TANG, SKOPIL, SCHROEDER, FARRIS, ALARCON, FERGUSON, CANBY and REINHARDT, Circuit Judges

GOODWIN, Circuit Judge

Two prison officials appeal a judgment for $2,090 in damages and $45,383 in attorneys' fees in Frank Haygood's § 1983

action for damages for prolonging his state prison detention by using an incorrect method to compute his release date. Haygood v. Younger, 527 F.Supp. 808 (E.D. Cal. 1981). Our panel decision reversed that judgment. Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), withdrawn, 729 F.2d 613 (9th Cir. 1984). Because this case presents important questions about the scope of due process available to state prisoners, we took it with two others for en banc reconsideration.[1]

The law in this circuit and elsewhere is controlled by the Supreme Court opinions in Parratt v. Taylor, 451 U.S. 527 (1981), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Hudson v. Palmer, ____ U.S. ____, 104 S.Ct. 3194 (1984). Those

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1 This case was heard along with Piatt v. MacDougall, 723 F.2d Adv. Sh. 721 (9th Cir.), withdrawn, 729 F.2d 613 (9th Cir. 1984), and Bretz v. Kelman, 722 F.2d 503 (9th Cir. 1983), withdrawn, 729 F.2d 613 (9th Cir. 1984).

three cases shed recent light upon any analysis of claims under § 1983. Haygood's particular injury and the process the state provided, although unusual, do not require a departure from settled precepts of § 1983 analysis.

Background

Frank Haygood, after spending more than twenty years in California prisons, obtained his freedom by bringing a habeas corpus action in state courts. In re Haygood, 14 Cal.3d 802, 122 Cal. Rptr. 760, 537 P.2d 880 (1975). In that action, Haygood challenged the formulae by which the California Adult Authority calculated his prison sentence under California's continuous term policy.[2] The problem arose because of

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[2] Until 1977, California had an indeterminate sentencing law under which a prisoner's specific sentence would be determined by the California Adult Authority within limits set by law. At the time, the state's continuous term policy required that,

an ambiguity between two California statutes with respect to when Haygood's term for escape could commence.

While serving two terms for previous convictions, Haygood escaped from prison and subsequently committed a robbery. He was first tried for and convicted of the robbery and after that the escape. Section 669 of the California Penal Code provided that where a defendant is convicted of two crimes, the second sentencing judge has discretion to make the terms of the two convictions concurrent or consecutive. Cal. Penal Code

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when a prisoner had two or more terms which were ordered to be served consecutively, they would become one continuous term in which none of them would be discharged until all were discharged. See Cal. Penal Code § 1168 (West 1970).

All References to the California Penal Code herein are to the Code in effect at the time of Haygood's sentencing in 1959 or at the time of the California Supreme Court decision in 1975. Several sections cited have since been repealed or significantly amended.

§669 (West 1956). See In re Haygood, 537 P.2d at 885 n.7. Relying on this provision, the Adult Authority believed Haygood's escape term to be consecutive to his robbery term and did not fix his escape term to begin until after his robbery term had expired. See Cal Penal Code § 3021 (West 1956).

The California Supreme Court found that this determination by the Adult Authority was incorrect. At the time of Haygood's escape, § 4351 of the Penal Code required that an escape term commence at the time the escapee would have been discharged from the terms he was serving had he not escaped. Cal. Penal Code § 4531 (West 1956). The court found that this provision prevailed over the general provisions of § 669 and thus Haygood's escape term could not be consecutive to his robbery term, but only to the two terms he was serving at the time of his escape. Because these two terms had both

expired by March 14, 1963, Haygood's escape term could not be fixed as commencing after the end of Haygood's robbery term in 1970 (retroactively to January 8, 1969). Haygood thus should have been discharged at the end of his robbery term under § 2940 of the Penal Code.[3]

The panel opinion sets forth the details of Haygood's dispute with the state prison system. Haygood, 718 F.2d at 1474-78. We need not repeat those details here, beyond noting that in March 1974 Haygood wrote the

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[3] Section 2940 of the California Penal Code specified:

> Where the Adult Authority is authorized to fix and refix the term of imprisonment of a prisoner, such prisoner shall be discharged from custody upon the completion of said term so fixed or refixed and if the Adult Authority fails to fix the term of imprisonment the prisoner shall be discharged upon the completion of the maximum punishment provided by law for the offense for which the prisoner was convicted. Cal. Penal Code § 2940 (West 1956) (repealed 1977).

warden a letter questioning the running of his sentence for robbery. He demanded that he be released. The letter was investigated by the two defendants who then were employed as Records Officer II and Records Officer III. Their written answer to Haygood explained that, according to the relevant statutes, he correctly was being held to start his escape sentence after he completed his robbery sentence. They attached to their routing slip to Haygood a copy of an attorney general's opinion that they believed to be supportive of their letter. It does not appear from the record that Haygood then demanded or was offered an administrative hearing.

In due course Haygood brought habeas corpus proceedings in the state courts. The errors in Haygood's sequence of serving the various sentences did not become manifest until after the California Supreme Court had

subjected a complex web of sentences, statutes and regulations to sophisticated scrutiny. In re Haygood, 537 P.2d at 884-87. After Haygood's release from prison in 1975, he brought this action in federal court under 42 U.S.C. § 1983, alleging that more than a dozen state officers had deprived him of his liberty without due process of the law and subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

On pretrial motions, the claims against the state attorney general, the nine members of the California Adult Authority, and the director of the state department of corrections were dismissed. At the close of the plaintiff's case, the trial judge directed verdicts in favor of the warden of Folsom prison, the administrative officer of the Adult Authority, and the correctional counselor. The case went to the jury on the claims against Records Officers Cranke and

Seymour. The jury found these remaining defendants liable for depriving Haygood of his constitutional rights. There is no cross-appeal, and consequently no question before us on the reduction of the number of defendants in the case.

Appropriateness of § 1983

In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to remedy the alleged wrong.[4] We

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[4] An alternative remedy for damages was available to Haygood. California state law provides an action in tort for prisoners whose release is unlawfully delayed. See e.g., Jackson v. City of San Diego, 121 Cal. App.3d 579, 588; 175 Cal. Rptr. 395, 400 (1981) ("A person kept in custody after his jail term expires is entitled to redress for damages for false imprisonment even where the incarceration starts in a lawful manner"). See also Sullivan v. County of Los Angeles, 12 Cal.3d 710; 117 Cal. Rptr. 241, 527 P.2d 865, 869 (1974); Shakespeare v. City of Pasadena, 230 Cal.App.2d 375; 40 Cal. Rptr. 863, 869-70 (1964). Haygood is not, under present federal law, required to have explored state remedies before proceeding under § 1983 to seek compensation for alleged constitutional injury. Monroe v. Pape, 365 U.S. 167 (1961).

reach the issue of these defendants' § 1983 liability only if we find that the two essential elements to a § 1983 action are present: (1) the defendants acted under color of law, and (2) their conduct deprived Haygood of a constitutional right. 42 U.S.C. § 1983.

We need not be detained by the requirement that the defendants acted under color of state law. The defendants' conduct was under color of law. The officers were clothed with the legitimacy of the government and were purporting to act thereunder. Monroe v. Pape, 365 U.S. 167, 172-87 (1961). It is not necessary to show that these officers were acting specifically within the scope of their authority because negligent abuse of authority by state officials can form the basis for a § 1983 cause of action. Parratt, 451 U.S. at 534-35. Intentional acts by state officials, even if committed

without specific authority can satisfy the color of law requirements of § 1983, Hudson, 104 S.Ct. at 3202, as can conduct pursuant to established policy, Logan, 455 U.S. at 435-37, and errors by individual officers in the absence of an affirmative government policy. Baker v. McCollan, 443 U.S. 137, 146 (1979). Cf. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978); Wolf-Lillie v. Sonquist, 699 F.2d 864, 870 (7th Cir. 1983).

Our inquiry thus will focus on the second element of a § 1983 cause of action. Assuming that Haygood suffered an injury under color of law, that injury is cognizable under § 1983 if the right affected is one guaranteed by the constitution. Baker, 443 U.S. at 142.

Liberty is protected from unlawful state deprivation by the due process clause of the Fourteenth Amendment. Haygood alleges

that the defendant state officials deprived him of liberty by wrongfully keeping him in custody from 1970 to 1975. Although Haygood's sentence expired in 1970, the Adult Authority did not release him until ordered to do so in 1975 by the California Supreme Court. As the district court noted, the state lost its power to hold Haygood in 1970; any continued detention deprived him of his rightful liberty. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 246 (1972). See Haygood, 527 F.Supp. at 813.

Eighth Amendment Theory

Haygood's first theory of liability is that his unlawful incarceration constituted cruel and unusual punishment in violation of the Eighth Amendment.

Detention of Haygood beyond the termination of his sentence was undoubtedly punishment within the constitutional meaning of that term. Bell v. Wolfish, 441 U.S. 520,

535-40 (1979). To be cruel and unusual, punishment must be incompatible with "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 277 (1983). Detention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of "deliberate indifference" to the prisoner's liberty interest, see Estelle v. Gamble, 429 U.S. 97, 104-06 (1976); otherwise, such detention can be held to be unconstitutional only if it violates due process. Wolfish, 441 U.S. at 535 n.16.

The panel opinion held that the deliberate indifference standard requires a finding of some degree of individual culpability. Haygood, 718 F.2d at 1482 & n.2. The district judge gave the following instruction, with which the defendants agreed:

> In order to find plaintiff has been subjected to cruel and unusual punishment you must find that defendants, or any of them, by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment.

This imposed a more stringent standard of "an intent to punish" Haygood by retaining him beyond the termination of his sentence. On motion for judgment notwithstanding the verdict, the district judge emphasized three times in his opinion that there was sufficient evidence from which the jury could have found that Cranke and Seymour intended to punish Haygood by their actions, 527 F. Supp. at 819, 821-22. However, the district judge went on to explain his view that, on reflection, he no longer thought that it was necessary to prove that the defendants intended to inflict the additional imprisonment, but that "to the extent that the defendants caused such an injury to the

plaintiff, they were liable to him under section 1983." 527 F. Supp. at 822. In effect, the district judge was pointing out in dictum that the instruction he had given imposed a stricter standard of proof than he believed necessary, but that there was sufficient evidence to uphold the verdict, even under the stricter standard requiring intentional conduct.

The panel opinion disagreed with the dictum of the district court and held that "'cruel and unusual' requires a degree of culpability on the part of state officials." 718 F.2d at 1482. The panel found, and we agree, that the degree of culpability required is "deliberate indifference."

As the district court noted, "[T]he plaintiff presented credible evidence that the defendants, after being put on notice, simply refused to investigate a computational error." Haygood, 527 F. Supp. at 823. Thus,

there was adequate evidence from which the jury could have found liability under the appropriate standard of "deliberate indifference" and we need not determine whether the district court was correct in concluding there was sufficient evidence to support a finding of liability under the more stringent standard of actual intent.

Due Process Theory

Haygood's second theory of liability requires a more probing examination. He alleges that the illegal incarceration deprived him of liberty without due process of law, in violation of the Fourteenth Amendment.

False imprisonment or deprivation of liberty is not per se unconstitutional merely because the defendant is a state official. Baker, 443 U.S. at 146. Similarly, the Fourteenth Amendment does not guarantee state prisoners a particular method of calculating

prison sentences. See Wolff v. McDonnell, 418 U.S. 539, 557 (1974). But when the state itself creates a statutory right to release from prison,[5] the state also creates a liberty interest and must follow minimum due process appropriate to the circumstances to ensure that liberty is not arbitrarily abrogated. Vitek v. Jones, 445 U.S. 480, 488-89 (1980). See Mechum v. Fano, 427 U.S. 215, 226 (1976). Therefore, if the officials made their calculations in a manner which denied Haygood his statutory right to liberty without due process of law, a constitutional violation exists and a cause of action is available under § 1983. The question, thus narrowed, is whether the defendants denied Haygood due process of law.

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5 See Cal. Penal Code §§ 669, 2940, 3021, 4531 (West 1956). For a discussion of the interaction in these statutes and the proper statutory construction, see In re Haygood, 537 P.2d at 882-85.

Adequate, or due, process depends upon the nature of the interest affected. See Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972). The more important the interest and the greater the effect of its impairment, the greater the procedural safeguards the state must provide to satisfy due process. Id. at 481.

This circuit has not spoken with one voice on whether the taking of liberty demands inherently greater process than the taking of property. Compare Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), rev'd on other grounds, 461 U.S. 238 (1983) (liberty and property demand different process) with Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd on other grounds sub nom, Kush v. Rutledge, 460 U.S. 719 (1983) (liberty and property are the same). There is also a division among other circuits on this issue. See, e.g., Parratt,

451 U.S. at 545 (Blackmun, J., concurring); Patterson v. Coughlin, 761 F.2d 886, 890, (2d Cir. 1985) (procedural safeguards for liberty must be "at least equal" to those for property); Shelton v. City of College Station, 754 F.2d 1251, 1257 (5th Cir. 1985), reh'g pending, 765 F.2d 456 (5th Cir. 1985) (Parratt rules do not apply to deprivations of liberty); Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) (life and liberty inherently more important than property); Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (liberty and property not doctrinally distinct); Daniels v. Williams, 720 F.2d 729 (4th Cir. 1983) (liberty and property are similar), aff'd on reh. 748 F.2d 229 (4th Cir. 1984), cert. granted, 105 S.Ct. 1168 (1985); Wolf-Lillie v. Sonquist, 669 F.2d 864 (7th Cir. 1983) (treat liberty and property similarly).

While some judges have perceived in specific cases some rhetorical dichotomy between liberty and property, we believe that the inquiry more appropriately focuses on the gravity of the effect of government conduct on protected interests. All denials of life, liberty or property will fall somewhere on a continuum between relatively minor effects on nonconstitutional interests at one end, and the loss of life at the other. On that continuum, we recognize that a denial of liberty will often have a more grave effect upon the victim than will a deprivation of property. Without categorizing an interest as liberty or property, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), called for a balancing to determine what process is due. Mathews teaches that it is necessary to weigh the risk of an erroneous deprivation, the state's interest in providing (or not providing) specific

procedures, and the strength of the individual's interest. Id. at 335; Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S. Ct. 1487, 1494 (1985).

No one suggests that Haygood's five extra years in prison were de minimis. At least 17 months of his extra time were spent after his protests and demands were known to these defendants. On the continuum from minor to major effects on protected interests, Haygood's loss of liberty falls among the major deprivations. In light of Mathews, (social security) and Morrissey (parole revocation) due process in this case required the state to provide Haygood with a meaningful hearing at a meaningful time. Mitchell v. W. T. Grant Co., 416 U.S. 600, 611 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See Ingraham v. Wright, 430 U.S. 651, 674 (1977).

Deciding that due process required the state to provide Haygood with a meaningful hearing does not end our inquiry into whether he suffered a constitutional deprivation. We must next decide whether the hearing should have been provided at an earlier date than the hearing he eventually received in response to his state habeas corpus action.

In Parratt, Logan, and Hudson, the Supreme Court used the terms predeprivation and postdeprivation process to refer to hearings provided before and after the state's incursions against interests in liberty or property. By this shorthand, the court distinguished between that preventive process which must be provided before, and that remedial process in lieu thereof which constitutionally may be provided after a denial of recognized rights.

In the context of random, unauthorized constitutional torts, this shorthand is useful. See Parratt, 451 U.S. 527; Daniels, 748 F.2d 229. When we speak of a denial of liberty by official state policy or procedure, however, it is confusing and perhaps meaningless to speak of predeprivation or postdeprivation due process, because if a challenged loss of liberty was preceded by a due process hearing, there has been no constitutional deprivation. Process which precedes a loss of liberty obviously prevents a constitutional violation. Process which follows the loss of liberty can only provide a substitute remedy, usually money damages.

As Parratt and Hudson make clear, random and unauthorized deprivations of property by state prison officers, because they are random and unauthorized, cannot be prevented by due process hearings. This is

the rationale for Parratt's rule that a remedial hearing after the injury can provide due process in a narrowly limited class of cases. Parratt and Hudson did not decide, and we do not reach the question, whether the availability of some remedial relief in state court might be imposed as a bar to federal relief under § 1983 in the myriad fact situations that might present themselves in other cases against state and local government officials. Parratt and Hudson dealt with relatively minor infractions of prisoners' interests in their personal property, and did not deal with official assaults, batteries or other invasions of personal liberty. Cf. Wilson v. Garcia, ___ U.S. ___, 105 S. Ct. 1938, 1940 (1985).

Moreover, where the injury is the product of the operation of state law, regulation, or institutionalized practice, it is neither random nor unauthorized, but

wholly predictable, authorized, and within the power of the state to control. In such cases, the state may not take away the protected interest without a hearing in advance of the injury. Logan, 455 U.S. at 436. The state, in Logan, had destroyed the plaintiff's property interest in employment by failing to convene a hearing within the time mandated by the same statute that had created the interest. The Supreme Court noted that Logan was not challenging the commission's error, but was challenging the established state procedure itself which destroyed his rights without giving him an opportunity to be heard.

It is not every erroneous administration of state law that results in a denial of due process. For example, an innocent person can be imprisoned following a trial in which due process was scrupulously observed. Haygood argues that the denial of

liberty without due process occurs when a prison term is extended or a release date bypassed without a hearing. When the federal court balances the individual's liberty interest against the state's interest in the efficient administration of its indeterminate sentence scheme, the balance weighs heavily in favor of liberty. In the balancing process, the specific dictates of due process generally require consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Mathews, 424 U.S. at 335. As the

court observed in Logan, absent the necessity of quick action by the state or the impracticability of providing any preventive process, a remedial hearing would be constitutionally inadequate. 455 U.S. at 436, citing Parratt, 451 U.S. at 539.

In the context of the facts of the case at bar, Haygood served most of his time in custody executing sentences pronounced by courts exercising the essence of due process of law. Haygood continued to serve time in custody after his correct release date had passed because his keepers did not believe that he was entitled to be released. Whether this behavior on the part of his keepers was negligent or intentional, Haygood's keepers knew that he was protesting his retention in custody. The officers believed that their understanding of the statutes was superior to his. Haygood's response was habeas corpus. This took time. In the ordinary course of

state court litigation, Haygood established, nearly five years after he should have been released and 17 months after his protests were known, that his view of the matter was more nearly correct that was that of his keepers.

The record in Haygood's case revealed that he had been afforded due process before each of his sentences was imposed. Thus he was properly convicted of escape, and properly sentenced. The denial of due process occurred when state officers, through established interpretations of the regulations for setting release dates, without affording Haygood an opportunity to be heard, chose to extend his custodial period. This de facto government policy gave rise to a § 1983 claim against Records Officers Cranke and Seymour approximately seventeen months before Haygood's litigation established the proper release date. When

Haygood finally, by means of habeas corpus, came before the state Supreme Court, he obtained the judgment holding that he should have been released five years earlier. This was remedial, or postdeprivation, relief in part at least, but it did not satisfy the Logan, Morrissey, and Mathews line of cases that require a hearing before the rights are taken away. For these reasons, we hold that Haygood has stated a § 1983 claim for damages for denial of liberty without due process of law. The remaining question is whether the defendants still in the case had a qualified immunity defense as a matter of law, or whether a triable issue of fact remained to be resolved.

There was no affirmative state regulation which required the defendants here to calculate Haygood's prison term in the manner they chose. Their conduct was not, therefore, mandated by law. Rather, the

prison officials' actions were part of a continuous process that was responsive to the Adult Authority policies. The Adult Authority has been released from the case. The two clerical defendants remaining in the case employed formulae, provided by their superiors, to calculate Haygood's term. And, while those formulae were not mandated by law, these defendants testified that they calculated Haygood's term in a manner consistent with standard operating procedures, and responded to his numerous inquiries in accord with their general practice and understanding of their instructions. The Adult Authority's internal procedures not only permitted but also apparently approved these officials' conduct in repeatedly concluding their calculations with an erroneous release date. These facts at least require a consideration of the qualified immunity defense discussed in

Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

Qualified Immunity Defense

Even when the state government has done wrong, the officials who caused the injury can be shielded from liability if a defense is available under § 1983 (e.g., qualified immunity). Even the intentional deprivation of constitutional rights by state officials can be excused when those officials, in the exercise of reasonable good faith, believe their action or inaction to be lawful. See Albers v. Whitley, 743 F.2d 1372, 1376 (9th Cir. 1984), cert. granted, 105 S. Ct. 2700 (1985); Peraza v. Delameter, 722 F.2d 1455, 1457 (9th Cir. 1984); Burgwin v. Mattson, 522 F.2d 1213, 1214 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976). See also Anderson v. Central Point Sch. Dist. No. 6, 746 F.2d 505 (9th Cir. 1984).

The district court in substance submitted to the jury the question whether the defendants acted reasonably when they responded to Haygood's inquiries. Haygood, 527 F. Supp. at 823. The court did not have the benefit of Harlow when it instructed the jury, but it gave substantially the defendants' requested instruction on good faith and reasonable conduct when it told the jury:

> That is to say, the law will change a person with notice and knowledge of whatever he would have learned, upon making such inquiry as it would have been reasonable to expect him to make under the circumstances.
>
> Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain has existed for a substantial period of time, and that (the defendant) had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.
>
> If after considering all of the circumstances as they reasonably appeared at the time when the defendant acted, it appears to you that a defendant reasonably believed that he was discharging the duties of his office and

> that the defendant acted in good faith on the basis of these beliefs, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claims.

The jury in this case, after considering the court's instructions on qualified immunity, found for Haygood and decided that his damages against Cranke should be $640, and his damages against Seymour should be $1,450. These modest amounts awarded for some 17 months of extra time in prison after release was demanded do not reflect that the jury was prejudiced against the defendants by any imperfection in the instructions. The verdict did reflect the considered judgment of a jury that Frank Haygood had been wronged under color of law by two records officers who knew or should have known that he was entitled to be released earlier than he was released. Given the judge's instruction, the jury must have considered some element of good faith in

mitigation of damages, and also may have considered that these two defendants were relatively small cogs in the machine that malfunctioned. In any event, no useful purpose would be served by sending the case back for another trial on the qualified immunity defense at substantial expense to both parties when the plaintiff has not cross-appealed.

Conclusion

A prisoner's petition for damages for excessive custody can be a legitimate § 1983 claim. A court's first task is to determine whether Parratt (random act) or Logan (official practice and procedure) controls. If the wrongful taking of liberty results from either affirmatively enacted or de facto policies, practices or customs, the court must determine when the responsible state officers received notice of a claim that a wrong was being done. When an

official with the authority to rectify an erroneous practice receives notice of the wrongful practice and its harmful consequences, due process requires the state to provide a hearing before a further denial of liberty can be said to be free from § 1983 liability.

We conclude, therefore, that Haygood was deprived of his liberty under color of law. The Logan, rather than the Parratt rules apply, and Haygood has a cause of action under § 1983 for denial of liberty without due process, subject to the qualified immunity defenses.

The error in submitting the Eighth Amendment claim without an instruction requiring proof of deliberate indifference to the rights of the prisoner was not prejudicial to these defendants in light of

the record as a whole and does not justify a new trial.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK HAYGOOD,	No. 81-4686
Plaintiff-Appellee,	DC # CV-S-75-738-LKK
vs.	
EVELLE J. YOUNGER, etc.,	OPINION
Defendants,	
and	
HAROLD CRANKE and BENJAMIN SEYMOUR,	
Defendants-Appellants.	

Appeal from the United States District Court for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding
Argued and Submitted April 14, 1983

Before: WISDOM*, SNEED and FARRIS, Circuit Judges

SNEED, Circuit Judge:

Harold Cranke and Benjamin Seymour,

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*Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

records officers at Folsom State Prison and the California Department of Corrections, respectively, appeal from the district court's denial of their motion for judgment notwithstanding the verdict in a section 1983 action. Frank Haygood alleged that Cranke and Seymour violated his due process and Eighth Amendment rights by improperly investigating his legal status while he was incarcerated pursuant to a series of concurrent and consecutive sentences. He contended that their conduct resulted in his unlawful confinement beyond the actual term of those sentences. The jury returned a general verdict of $2,090 in damages. Cranke and Seymour also appeal the award of $45,383 in attorney's fees. We reverse and remand.

I.

FACTS

The decision of the California Supreme Court, which appears in part in the

margin, granting Haygood's habeas corpus release.[1/] See In re Haygood, 14 Cal. 3d 802, 122 Cal. Rptr. 760 (1975). 1958 is a good year in which to commence the recital of facts particularly relevant to this case. Haygood escaped in that year from a prison camp while serving concurrent sentences previously designated as his "A" and "B" terms. While at large he committed a robbery, for which he received a sentence designated his "C" term. Subsequently he was convicted of the escape, for which he received a sentence designated his "D" term. Upon his return to prison, the Department of Corrections and the California Adult Authority treated his "D" term for escape as consecutive not only to his "A" and "B" terms, which he had been serving when he escaped, but also the "C" term imposed for the robbery he committed after escaping. Id. at 806-07, 122 Cal. Rptr. at 762-63.

On October 8, 1970, the Adult Authority granted Haygood a parole date of December 14, 1970. Had Haygood not violated his parole all terms would have been discharged on July 8, 1974. His "C" term was also fixed by the Adult Authority at ten years and his "D" term at five-and-one-half years resulting in a final discharge date of July 8, 1974, on all his terms. Because the October 8 action fixed the "C" term at less than the time already served, Haygood received an "administrative discharge" for that term retroactive to January 8, 1969, the date upon which he had served ten years on the term. The Adult Authority intended by this order to cause the "D" term to commence retroactively as of that date. Id. at 807, 122 Cal. Rptr. at 763. Although plaintiff's prison records indicated that he had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961,

respectively, the Adult Authority continued to refer to those terms in accordance with the "continuous term policy." That policy provided that when a prisoner receives a sentence which is to run consecutively to another term, no single term is discharged until all are. Each consecutive sentence was regarded as but a segment of a single continuous term.

Haygood, following his release on parole, violated his parole and was returned to prison. Again he was released and again he returned. At that time, December 13, 1973, the Authority, after finally revoking his parole, purported to refix his "C" and "D" terms at their maximum of life imprisonment. Id. at 807-08, 122 Cal. Rptr. at 763-64.

Thereafter Haygood received a form from the Adult Authority notifying him of his legal status. At trial he testified that he

thought the form indicated that he was still serving time on his "A" and "B" terms as well as his "C" term and that he had not been credited with having served any time on his "D" term. A correctional counselor at Folsom State Prison met with Haygood on at least five occasions to discuss these concerns. The counselor also discussed them with defendant Cranke, a Records Officer II at Folsom State Prison. Haygood later wrote to Cranke regarding his sentences. After reading the letter, Cranke reviewed Haygood's central file, which included his legal status form, the cumulative case summary, the abstracts of judgment, and materials from the sentencing proceedings. Cranke answered Haygood's concerns about his sentence by referring him to the continuous term policy set forth in two California Attorney General's opinions.

A short time later Haygood wrote a letter to the Administrative Officer of the Adult Authority, who, without acting, passed the letter on to defendant Benjamin Seymour, a Records Officer III for the Department of Corrections. Seymour reviewed Haygood's central file and pertinent Attorney General's opinions and spoke with Cranke to confirm Haygood's legal status. On April 1, 1974, Seymour sent a letter to Haygood responding to his questions.

Dissatisfied with these responses, Haygood filed a pro per petition for a writ of habeas corpus in the California Supreme Court. Id. at 804-05, 122 Cal. Rptr. at 761. In accord with the objections he had expressed in his letters, Haygood alleged that the Department of Corrections and the Adult Authority "had acted unlawfully in refixing certain of [his] terms . . . and in

revoking credit for time served on another." Id. at 805, 122 Cal. Rptr. at 761.

Counsel for Haygood was appointed and in a supplemental petition prepared by counsel it was alleged that the order of the sentencing judge on his 1959 escape conviction "did not purport to make the 'D' term consecutive to the 'C' term, and that even had the judge attempted to order that the 'D' term be consecutive to the 'C' term, he lacked the authority to do so." Id. at 808, 122 Cal. Rptr. at 764. A fellow prisoner who had aided Haygood in composing his numerous letters to prison authorities conceded at the section 1983 trial that neither he nor Haygood had had this theory in mind prior to appointed counsel's preparation of the supplemental petition.

The California Supreme Court by a six to one majority found the argument raised by the supplemental petition dispositive. It

held that the Department of Corrections and the Adult Authority had erroneously treated the "D" term as consecutive to the "C" term by misinterpreting the 1959 escape judgment. Haygood's terms had therefore effectively terminated no later than October 8, 1970, the date of the administrative action fixing his terms. Thus, the Adult Authority had no power to refix terms which he had already irrevocably discharged. The court ordered him released.

To this point this case presents nothing very unusual. The Adult Authority under California's then indeterminate sentencing procedures, which were in effect until 1976-77, miscalculated the release date of a recidivist prisoner. This mistake was corrected by the California Supreme Court as a result of Haygood's utilization of California's habeas corpus procedures. A

wrong done by officials of California was corrected by California courts.

This case commences to take on its present form when Haygood alleged in this section 1983 action that he had been deprived of his right to liberty without due process of law that he had been subjected to cruel and unusual punishment contrary to the Eighth Amendment as incorporated into the Fourteenth Amendment. The Attorney General of the State of California, the Director of the California Department of Corrections, members of the California Adult Authority, the Administrative Officer for the Adult Authority, and four prison officials, including Cranke and Seymour, were named as defendants.

On April 3, 1976, the district court dismissed the complaint as to the Attorney General and the Adult Authority members on the ground that they were absolutely immune.

On January 5, 1978, the court dismissed the Director insofar as the complaint sought damages. On March 21, 1978, the court dismissed the complaint as to all defendants insofar as it sought declaratory relief. On the third day of trial, the court granted the motion for directed verdict as to two of the prison officials and the Administrative Officer for the Adult Authority, but denied it as to Cranke and Seymour, the remaining defendants. The jury returned a general verdict against Cranke for $640 and against Seymour for $1,450. The trial court denied their motion for judgment notwithstanding the verdict. See Haygood v. Younger, 527 F. Supp. 808 (E.D. Cal. 1981).

We have disposed of Haygood's appeals from the pretrial dismissals by unpublished memorandum order. This appeal concerns only the propriety of the trial

court's denial of the motion for judgment notwithstanding the verdict.

Cranke and Seymour contend that the district court erred in seven different ways. These are:

1. By ruling that simple negligence can support a cause of action under section 1983 founded on deprivation of due process and Eighth Amendment rights;

2. By holding that the availability of a tort remedy under California law did not provide Haygood due process so as to preclude his section 1983 suit;

3. By finding the evidence introduced at trial sufficient to support the jury verdict;

4. By denying their motion for directed verdict based on a good faith defense;

5. By awarding Haygood attorney's fees under section 1980;

6. By denying discovery and an evidentiary hearing on the issue of the reasonableness of Haygood's attorney's fees; and

7. By awarding attorney's fees which were grossly disproportionate to Haygood's recovery.

The first, second, and seventh assigned errors present legal issues, the third and fourth go to the sufficiency of the evidence, and the fifth and sixth raise issues that pertain to the manner in which the trial court exercised its discretion. Our disposition turns on legal issues reasonably embraced by appellant's first two assigned errors. As a consequence, our review is de novo.

The approach we employ best can be understood by setting forth the main points of the district court's analysis of this case which appears in its published opinion. See Haygood v. Younger, 527 F. Supp. 808 (E.D. Ca. 1981). The district court held, first, that the plaintiff was improperly deprived of his liberty; second, that this deprivation was done under "color of state law"; third, that 42 U.S.C. § 1983 requires no particular state of mind on the defendant's part;

fourth, that post-deprivation processes in the case of a deprivation of liberty can never provide the "due process" required by the Fourteenth Amendment because money damages can never restore previously lost liberty; fifth, that plaintiff's incarceration beyond the expiration of his term even for one day was "cruel and unusual punishment" within the meaning of the Eighth Amendment; sixth, that, inasmuch as no particular state of mind is required by section 1983, the charger to the jury that to find for the plaintiff it must find that the defendants "by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment," was more favorable to the defendants than the law required; and, finally, that the jury could reasonably conclude that the defendants failed to establish that they acted entirely in good

faith and that their belief in the correctness of their actions was reasonable.

We readily agree with the district court's first two points and are prepared to assume, arguendo, that the third is also correct with respect to section 1983 suits alleging deprivations of liberty or property without the due process required by the Fourteenth Amendment. We reject the third point to the extent it relates to suits alleging Eighth Amendment violations as our discussion below will indicate. We disagree, moreover, with the fourth, fifth, and sixth points of the district court. We hold, accordingly, that post-deprivation processes can provide the "due process" required by the Fourteenth Amendment and that Haygood's incarceration beyond the expiration of its term even for one day was not ipso facto "cruel and unusual punishment" within the meaning of the Eighth Amendment. Because the

district court's approach to the trial of this case was thoroughly infused with its fourth, fifth, and sixth points, our disagreement with these positions, as well as our limited disagreement with the third, requires that we reverse the judgment of the district court in its entirety. Pursuant to the provisions of Rule 50(d) F.R. Civ. P., we remand for a new trial.

II.

DEPRIVATION OF LIBERTY AND POST-DEPRIVATION DUE PROCESS

A.

In Parratt v. Taylor, 451 U.S. 527 (1981), the Supreme Court indicated that negligence might suffice to support a section 1983 cause of action. It did this most strongly by its observation that "[b]oth Baker v. McCollan [443 U.S. 137 (1979)] and Monroe v. Pape [365 U.S. 167 (1961)] suggest that § 1983 affords a 'civil remedy' for

deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535. The proposition was not essential to the decision. Justice Powell, believing that the Court had decided this threshold question without squarely addressing it, concurred only in the result. 451 U.S. at 546; see also id. at 554 (Marshall, J., concurring in part and dissenting in part). Nonetheless, we have previously read Parratt to hold that negligence alone can support a section 1983 cause of action. See Hirst v. Gertzen, 676 F.2d 1252, 1262-63 (9th Cir. 1982); accord Fernandez v. Chardon, 681 F.2d 42, 55 (1st Cir. 1982), cert. denied in part, 103 S. Ct. 343 (1982), aff'd on other grounds sub nom. Chardon v. Soto, 103 S. Ct. 2611 (1983); Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981). Contra Price v. Baker, 693 F.2d

952, 953 (10th Cir. 1982) (notwithstanding Parratt, "uncertainty whether negligence will support a § 1983 action").

Recognition that a section 1983 action can rest on negligent conduct pushes to the forefront the issue whether post-deprivation process can satisfy the Fourteenth Amendment requirement of due process. A pre-deprivation hearing is not feasible with respect to a deprivation caused by negligence. Parratt v. Taylor resolved the issue affirmatively by holding that the state tort remedies for wrongful deprivation of a prisoner's property satisfied the due process requirement.

Parratt v. Taylor, however, involved a deprivation of property--not liberty. Courts are divided on the question whether Parratt applies to deprivations of liberty interests. Compare Daniels v. Williams, ___ F.2d ___ (4th Cir. 1983) (Parratt applies to

some deprivations of non-property interests including negligent deprivation of liberty interests); Wolf-Lillie v. Sonquist, 669 F.2d 684, 871 (7th Cir. 1983) (Parratt "requires federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law"); Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.), cert. denied, 103 S. Ct. 488 (1982); Juncker v. Tinney, 549 F. Supp. 574, 576-79 (D. Md. 1982), with Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982) (Parratt does not apply to deprivations of liberty). The issue is unsettled in this circuit. Compare Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (Parratt applies; no due process violation; section 1983 cause of action unavailable), aff'd on other grounds sub nom. Kush v. Rutledge, 103 S. Ct. 1483 (1983),

with Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (Parratt does not apply; due process violation; section 1983 cause of action available), rev'd on other grounds, 103 S. Ct. 1741 (1983).

In refusing to apply Parratt, the Wakinekona court pointed our that Justice Blackmun's concurrence, with Justice White endorsed, limited the case to property interests. 664 F.2d at 715; see 451 U.S. at 545. However, such a limitation appeared neither in the Court's opinion, which commanded five votes in addition to those of Justices White and Blackmun, nor in the concurrence of Justice Stewart, one of those who joined the majority. Moreover, Justice Blackmun provided no rationale for the limitation he suggested. Nor did the Wakinekona court, which simply pronounced that cases "dealing with a liberty interest

[are] of a wholly different nature" than those involving property. 664 F.2d at 715.

The Fifth Circuit in Brewer, which also refused to apply Parratt to liberty interests, relied on the narrow reading given that case by the Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt. 692 F.2d at 394-95; see 455 U.S. at 436. Logan, however, presents an issue different from that involved here. A charge with the Illinois Fair Employment Practices Commission was filed by Logan alleging that his employer had wrongfully discharged him because of physical handicap. At the time, the Illinois fair employment statute required that the Commission hold a factfinding conference within 120 days, which it failed to do for reasons beyond Logan's and his employer's control. The Illinois Supreme Court held

that the Commission's failure to convene in a timely manner the statutorily mandated conference deprived the Commission of jurisdiction and extinguished Logan's cause of action. It rejected his due process and equal protection arguments, finding that the procedures established by the statute were reasonable.

The Supreme Court reversed. It concluded that due process required that:

> [T]he Commission consider the merits of [Logan's] charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. . . . A system or procedure that deprives persons of their claims in a random manner, as is apparently true of [the Illinois statute], necessarily presents an unjustifiably high risk that meritorious claims will be terminated.

455 U.S. at 434-35. The Logan Court distinguished Parratt because Logan challenged "the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."

Id. at 436. Logan complained about a systemic procedural deficiency, not about an unexpected or random error. While the Court cited Justice Blackmun's concurrence in Parratt to support its position, nothing in the holding or analysis of Logan required the Court to undermine Parratt.

Whether a process statutorily provided for a certain purpose satisfies the Fourteenth Amendment's due process requirement is one issue. Whether, following a deprivation of liberty for which a pre-deprivation hearing would not be feasible, the post-deprivation process can satisfy the Fourteenth Amendment is another. And if this question is answered affirmatively, a third issue is whether the available post-deprivation process does satisfy the Fourteenth Amendment. Logan is concerned only with the first issue; in this case we are concerned with the second and

third. It is true that the first and the third resemble each other. However, the first is concerned with pre-deprivation situations while the third only arises when pre-deprivation processes are not feasible.

Thus, the Logan Court found the state system unconstitutional. The statute was deficient because it provided inadequate pre-deprivation process under circumstances in which such process was feasible. It provides no guidance with respect to situations in which pre-deprivation process is not feasible.

The district court here refused to apply Parratt's reasoning to liberty interests because it believed that to do so would revive the requirement, rejected at least since Monroe v. Pape, 365 U.S. 167 (1961), that a section 1983 plaintiff must first exhaust state remedies. See 527 F. Supp. at 815; cf. Patsy v. Board of Regents,

457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to a section 1983 action). We disagree. This objection amounts to a rejection of the reasoning of Parratt; it has no greater force with regard to a liberty interest than to a property interest. It misperceives Parratt's import by confusing the rights accorded by the Fourteenth Amendment's due process clause with the remedy afforded by section 1983. Parratt did not deny Taylor a remedy; it defined his rights. The decision does not require that state remedies be exhausted. It held that no constitutional violation occurred. Resort to federal court in situations encompassed by its rationale is foreclosed. See Ellis, 669 F.2d at 515; Juncker, 549 F. Supp. at 578. And for that matter, so is recourse to state courts on a section 1983 claim.

We hold, therefore, that Parratt applies to situations in which process prior to deprivation of liberty would not be feasible or practicable. It is the adequacy of the state post-deprivation process that is properly at issue once it is clear that pre-deprivation process was neither feasible nor practicable. The distinction between deprivations of property and those of liberty in that context is unimportant.

The district court obviously did not embrace this position. It focused first on the rights guaranteed Haygood rather than the remedies available to him. 527 F. Supp. at 814. It reasoned that since the state had lawfully confined Haygood after conducting a hearing, "he had a correlative due process right to be released from prison when his lawfully fixed term of imprisonment expired." Id. Thus, it concluded, "the process to which Mr. Haygood was entitled was to have

his liberty restored him at the precise moment fixed by state law." Id.

This analysis is fatally flawed. It makes the deprivation itself a denial of due process. That amounts to saying that a deprivation of liberty, i.e., a wrongful incarceration, is a violation of the Fourteenth Amendment without regard to whether the available process was adequate or inadequate, pre-deprivation or post-deprivation. That is not the law. The Fourteenth Amendment protects only against deprivations without due process of law. See Parratt, 451 U.S. at 537; Baker, 443 U.S. at 145. Section 1983 does not provide a cause of action for every wrongful or improper deprivation of either liberty or property by a state without regard to the process by which it is accomplished. It is not an insurance policy against mistakes being made by those acting under the color of state law.

It only insures against mistakes made in the absence of "due process."

The district court found Parratt inapplicable in part because of its belief that no process could be "due" inasmuch as money damages can never adequately compensate for a deprivation of liberty. It is true that money cannot restore even a moment of the past. However, that is true without regard to whether Haygood has a cause of action under section 1983 or not. The inability of money to restore liberty previously lost is simply irrelevant to whether Parratt is applicable to deprivations of liberty.

B.

It remains for us to determine whether the process accorded Haygood meets the constitutional standard of "due process." Haygood was accorded substantial, but as it turned out not mistake free, "process"

commencing shortly after the date on which it was later determined that he should have been released. On October 8, 1970, the Adult Authority fixed both his "C" and "D" terms and a parole date of December 14, 1970. As already pointed out, had plaintiff not violated his parole all terms would have been discharged on July 8, 1974. However, twice his parole was suspended and finally revoked on December 13, 1973. Thereafter commenced the plaintiff's encounters with the defendants and others in which he insisted that he, in some fashion or other, was being required to serve more time than his sentences required. This, too, was part of the "process" afforded the plaintiff by the State of California. Additional "process" was afforded by way of the habeas corpus proceedings which, unlike other "process" to which plaintiff enjoyed access, achieved the end he sought--his release from prison.

Finally, a remedy under state tort law existed of which Haygood failed to take advantage.

We hold this array of "processes" is sufficient to meet the constitutional requirement. Under the facts of this case, the distinction between pre- and post-deprivation process does not loom as large as it might. Process commenced after the expiration of the "A" and "B" terms, viz., October 8, 1970, and before the "C" term was fixed, which term after being so fixed was retroactively treated as discharged as of January 8, 1969. We know not what the Adult Authority would have done had it not believed that the "D" term had not been served. Arguably "process" can be said to have commenced before the deprivation of liberty and continued thereafter. In any event it was a continuous process that was responsive to the rules of the Adult

Authority as the officials then understood them, as well as to Haygood's complaints. When this is realized the true nature of this case becomes clear. It is simply an instance in which the proper authorities understood the California law of indeterminate sentences in a fashion subsequently determined to be incorrect by the Supreme Court of California on a six to one vote. No liberty interest of the defendant was stripped from him without due process. All available process, both before and after the deprivation of liberty, was accorded Haygood. That which was utilized post-deprivation was not feasible before deprivation. That the process was lengthy does not in this setting make it constitutionally inadequate. Neither does the fact that only the state court of last resort set matters aright. Arguing that processes that ultimately vindicated the

claim asserted are constitutionally deficient is surprising, if not perverse.

III.

EIGHTH AMENDMENT

As already indicated we reject the district court's view that a single day's incarceration beyond a prisoner's lawful term is "cruel and unusual punishment" within the meaning of the Eighth Amendment. Our approach to the Eighth Amendment issue rests on four separate but interrelated propositions.

(1) Detention of the plaintiff beyond the termination of the sentence under the facts of this case was punishment within the constitutional sense of the term. See Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

(2) Punishment to be cruel and unusual, that is to be incompatible with "the evolving standards of decency that mark

the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), must involve an unnecessary and wanton infliction of pain or be grossly disproportionate to the severity of the crime. See Solem v. Helm, 103 S. Ct. 3001, 3006 (1983); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Estelle v. Gamble, 429 U.S. 97, 102-03 (1976).

(3) Detention beyond the termination of the sentence constitutes cruel and unusual punishment when it results from "deliberate indifference" to the prisoner's interest in liberty. See Estelle v. Gamble, 429 U.S. at 104, 104-06.

(4) Detention beyond the termination of the sentence that is not the result of "deliberate indifference" must be measured against the Due Process Clause of the Fourteenth Amendment. Cf. City of

Revere v. Massachusetts General Hospital, 103 S. Ct. 2979, 2983 (1983) (where the Eighth Amendment rights are not violated, Due Process Clause governs alleged deprivations of liberty); Bell v. Wolfish, 441 U.S. at 535 n.16 (the Due Process Clause, rather than the Eighth Amendment, governs the rights of of pretrial detainees).

From these propositions it follows that the district court erred in its fifth and sixth holdings and that it improperly instructed the jury with respect to the alleged Eighth Amendment violations. The authority for these propositions is indicated therein.

Admittedly, suits seeking damages for post-sentence-termination detention are rare, and legal authority sparse. One case has been found subjecting such detention to due process analysis, Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980), but none subjecting

it either to automatic Eighth Amendment proscription or to Eighth Amendment scrutiny. It appears to be a novel issue. Evidence of its novelty can be demonstrated by making the assertion that those whose convictions are overturned by post-conviction remedies may have a section 1983 cause of action against the convincing state or a Bivens-type cause of action against the convincing United States. The books presently contain few if any cases making this assertion.

The foundation on which the above propositions rest is that not all improper punishment is cruel and unusual. That being so, the issues this case presents are whether Haygood's post-sentence-termination detention was (1) cruel or unusual, or (2) in violation of the Due Process Clause of the Fourteenth Amendment. The first must be resolved negatively if the improper punishment was not imposed as a result of "deliberate

indifference" and similarly must the second if the "process" available meets, as we have held it does in this case, the constitutional standard of "due." Because the district court did not approach the case in this fashion we reverse and remand for a new trial.

Our major difference with the district court in the Eighth Amendment area is that, unlike the district court, we find that "cruel and unusual" requires a degree of culpability on the part of state officials. Cases arising from analogous situations support this approach by employing the "deliberate indifference" standard.[2/] To treat as "cruel and unusual" incarceration even for a moment without regard to the fault of those responsible is to drain "cruel and unusual" of its fault content and to obscure the socially useful distinction between being "bad," on the one hand, and being merely

"mistaken" on the other. To treat the "mistaken" as if they were "bad" removes an incentive to avoid evil. Use of the standard "deliberate indifference" retains the incentive and avoids treating "cruel and unusual" as describing only a type of absolute liability. A society that treats the "mistaken" as it does the "bad" must accept treating the "bad" as it does the "mistaken." The latter, at least, will prove offensive to most of us.

We do not mean to suggest that the "deliberate indifference" standard should be employed universally in determining whether certain punishment is "cruel and unusual." For example, certain prison conditions, arguably grossly disproportionate to the severity of all or most of the crimes committed by the inmates, might be the result of public "deliberate indifferences" rather than such indifference on the part of prison

officials. The good faith and deep concern of these officials would not preclude confronting a claim based on the Eighth Amendment in which substantial changes in prison conditions were sought. Our resort to the "deliberate indifference" standard, fashioned by the Supreme Court in response to charges of medical neglect of a particular prisoner, merely recognizes that a charge of legal neglect on the part of officials of the Adult Authority of an individual prisoner, which is the essence of Haygood's charges, is sufficiently similar to medical neglect to justify using the same standard. To impose a more demanding standard embraces liability without fault, which we are unwilling to do, while to impose a more lenient standard departs without good reason from equal treatment. We limit the "deliberate indifference" standard to those situations in which a prisoner complains of specific

mistreatment not generally suffered by all inmates.

IV.

THE GOOD FAITH DEFENSE

Because we are remanding this case for a new trial we comment on the manner in which the good faith defense should function. The district court approached the good faith defense on the assumption that the defendants could have determined their computational error had they taken the trouble to study the plaintiff's file with reasonable care. Haygood v. Younger, 527 F. Supp. at 822-24. While we are not prepared to say that a jury could not have so found, we are convinced, after reviewing the transcript of the trial, that another view of the evidence is not unreasonable. That alternative is that neither the defendants nor their superiors saw any error in their computation and that

their interpretation of the law was not unreasonable.

In light of the evidence the district court should have instructed the jury on the good faith defense in the manner required by Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727 (1982). This is true, although the trial in the case antedates Harlow, because the essence of the defense was clearly established previously. See Procunier v. Navarette, 434 U.S. 555 (1978). Under Harlow government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ___ U.S. at ___, 102 S. Ct. 2738. Thus, the good faith defense exists if the conduct complained of does not violate "clearly established statutory or constitutional rights of which a

reasonable person would have known." Harlow's standard is objective. Of course, an official who knows that his conduct violates the law cannot shield himself by insisting that all others were reasonably less well informed.

We note, however, that there is some overlap between our "cruel and unusual punishment" analysis and Harlow's enunciation of the good faith defense. To illustrate, a proper charge on the Eighth Amendment grounds of recovery should embody the "deliberate indifference" standard set forth in Estelle v. Gamble. A jury so charged that returned a verdict finding cruel and unusual punishment under this standard could not consistently find that the defendants had proved the good faith defense. That is those "deliberately indifferent" to the plaintiff's detention could not show that they had not violated "established statutory or constitutional

rights of which a reasonable person would have known."

From this, as well as our holding that the process afforded Haygood both before and after the improper deprivation of liberty met constitutional standards, it follows that a new trial must be focused exclusively on whether Haygood was subjected to cruel or unusual punishment under the "deliberate indifference" standard. The "good faith" defense has no legitimate role to play on remand. Should it be determined that the punishment was not "cruel and unusual" the defendants are absolved of all liability. A finding of "cruel and unusual" punishment, on the other hand, under the circumstances of this case, eliminates the possibility of establishing a good faith defense.

In view of the remand we set aside the award of attorney's fees without prejudice to its reinstatement or

modification should the outcome of a new trial so warrant.

REVERSED AND REMANDED.

FOOTNOTES

1. WRIGHT, Chief Justice.

We issued an order to show cause in response to a petition for writ of habeas corpus prepared in propria persona by Frank Haygood, an inmate of the California State Prison at Folsom, alleging that the Department of Corrections and the Adult Authority had acted unlawfully in refixing certain of the terms to which he has been sentenced and in revoking credit for time served on another. Counsel was appointed for petitioner. His review of conviction a .. sentencing data relative to petitioner's confinement led him to conclude that additional issues should be raised on petitioner's behalf. By leave of the court a supplemental petition was filed and respondent Department of Corrections has replied to both the original and supplemental petitions, which we shall hereinafter refer to in the singular as the petition. We have concluded, based on the undisputed facts set out in the petition and the return thereto, that petitioner's terms as fixed by the Adult Authority (Authority) had been fully served prior to the date upon which the Authority last purported to extend them, and that notwithstanding any erroneous legal conclusions that may have influenced the Authority when it fixed those terms, petitioner is entitled to be discharged.

In 1946 petitioner was convicted of escape in violation of Penal Code Section

4530. He was sentenced to the term prescribed by law which was then a term of imprisonment not exceeding 10 years. It is undisputed that petitioner was discharged from this "original" term on June 29, 1953.

On March 24, 1949, petitioner was convicted of five counts of forgery in violation of section 470. He was sentenced to concurrent terms of 1 to 14 years' imprisonment. These "A" terms were concurrent with the "O" (original) term and commenced on April 1, 1949, when petitioner was delivered to the custody of the Department of Corrections.

On April 23, 1956, petitioner was convicted of carrying a concealed weapon in violation of section 12021. The offense was committed while petitioner was serving his "A" terms on parole. He was sentenced to a term not exceeding five years. This "B" term, which was concurrent with the "A" terms, commenced April 25, 1956. Although its records reflect no discharge from the "A" and "B" terms, but instead indicate service of more than 23 years on the 14-year maximum "A" terms and 18 years on the 5-year maximum "B" term, before this court respondent concedes that the maximum duration of the "A" and "B" terms was approximately April 1963 and May 1961, respectively. The Department of Corrections and the Adult Authority should, therefore, correct their records accordingly to reflect petitioner's discharge from the "A" and "B" terms.

On or about December 21, 1958, however, while he was still serving the "A" and "B" terms, petitioner escaped from a prison camp and shortly thereafter participated in a robbery. He was prosecuted first for the robbery and on January 5, 1959, was convicted and sentenced to a term of not less than one year for violation of section 211. This "C" term, which was concurrent with the then uncompleted "A" and "B" terms, commenced January 8, 1959.

Petitioner then pleaded guilty to escape in violation of section 4531, which has since been repealed. Two prior convictions charged in the information--the 1949 forgery and the 1956 concealed weapon convictions--were stricken prior to the plea. He was sentenced on April 14, 1959.

In sentencing petitioner for the escape the court orally recited that "he be committed to the state prison for the term prescribed by law, the sentence to run at the time he would otherwise have been discharged." The abstract of judgment, which erroneously included the stricken prior convictions, properly reflected the oral pronouncement of judgment. After printed language which read, "It is ordered that the sentences shall be served in respect to one another as follows," a section intended to apply only to sentences on multiple counts in the same judgment, the following typewritten entry appears: "Sentence to commence at the time said defendant would otherwise have been discharged." Following the printed entry "and in

respect to any prior incompleted sentence(s) as follows" a typewritten entry states, "Same as above." The instructions on the printed form direct the court to enter there its ruling whether the new term is to be "concurrent or consecutive to all incomplete sentences from other jurisdictions." Notwithstanding the sentencing judge's use of the statutory language of section 4531 that the term commence when petitioner "would otherwise have been discharged" from the terms he was serving at the time of the escape, i.e., the "A" and "B" terms, the Department of Corrections and the Adult Authority treated the escape term as consecutive not only to the "A" and "B" terms that petitioner was serving at the time of his escape, but also to the "C" term for the robbery he committed after the escape.

On October 8, 1970, after petitioner had served the maximum permissible number of years on the "A" and "B" terms, the Adult Authority fixed petitioner's "C" term at 10 years, and entered on its records an "administrative" discharge of the "C" term retroactive to January 8, 1969, the date upon which he had completed service of 10 years on that term. At the same time the Authority fixed petitioner's "D" term at five and one-half years with a discharge date of July 8, 1974, and set a parole date of December 14, 1970. The Authority intended by this order to cause the "D" term to commence retroactively as of January 8, 1969, the date of the discharge from the "C" term.

The Authority suspended petitioner's parole on January 7, 1972. By operation of Adult Authority policies then in effect, that suspension automatically caused any incompleted terms to be refixed at maximum. On March 14, 1972, in conjunction with the formal revocation of parole, the Authority again fixed the "C" term at 10 years, and this time fixed the "D" term at 6 years with a January 8, 1975, expiration date. Petitioner was again released on parole, but on April 27, 1973, his parole was suspended, again causing his terms to be refixed at maximum. On December 13, 1973, parole was formally revoked. His terms have not been refixed at less than maximum since that date. Although petitioner had served the period from January 8, 1969, to April 27, 1973, on his "D" term, the effect of refixing his "C" term at the life maximum, according to respondent, was to deny him any credit on the "D" term because that term could not commence until his discharge from the "C" term. Therefore, although 16 years have passed since petitioner was sentenced on the escape conviction, and even though he had once been given credit for service of over 4 years on that term, respondent now considers him to be serving only the "C" or robbery term. According to respondent, his "D" or escape term has not commenced. Thus petitioner, having once reached the goal of "administrative discharge" from his "C" term, and having embarked on service of his "D" term, like Sisyphus finds himself back again at the beginning, destined to endlessly repeat his own odyssey through the term-fixing process.

In re Haygood, 14 Cal. 3d at 804-08, 122 Cal. Rptr. at 761-64 (footnotes omitted).

2. See e.g., Wright v. Wagner, 641 F.2d 239, 241-42 (5th Cir. 1981) (failure to place self-destructive prisoner in padded cell violates Eighth Amendment only if it resulted from deliberate indifference); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (prison supervisors liable for failure to prevent beating of prisoners by guards only if supervisors' conduct was "'deliberate indifference' or . . . 'tacit authorization of the offensive acts . . .'"); Little v. Walker, 552 F.2d 193, 197 n.8 (7th Cir. 1977) (inadequate protection of prisoners violates Eighth Amendment if it results from deliberate indifference); West v. Rowe, 448 F. Supp. 59, 60 (N.D. Ill. 1978) (failure to respond to prisoner's letters stating that he was in danger is actionable if it resulted from deliberate indifference).

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-908

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR

Petitioners,

v.

FRANK HAYGOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX C AND D

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Petitioners,	)
v.	)
FRANK HAYGOOD,	)
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ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners Harold Cranke, and Benjamin Seymour, respectfully pray that this Court issue a writ of certiorari to review the judgment and en banc opinion of the United States Court of Appeals for the Ninth Circuit in Haygood v. Younger, et al., No. 81-4686 which was filed on August 27, 1985.

OPINIONS BELOW

The en banc decision of the Ninth Circuit Court of Appeals is reported as Haygood v. Younger 769 F.2d 1350 (9th Cir. 1985). A copy of this opinion is attached to the petition filed on November 22, 1985 as Appendix A. The panel opinion of the Ninth Grant Court of Appeals is reported as Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983). A copy of that opinion is attached to the petition as Appendix B. The November 30, 1981 decision of the United States District California denying petitioners' motion for a judgment notwithstanding the verdict is reported as 527 F.Supp. 808 (E.D. Cal. 1981) a copy of that opinion is attached hereto as Appendix C. The unreported decision of the District Court filed on November 30, 1981, granting respondent's motion for attorneys fees is attached hereto as Appendix D.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TO BE PUBLISHED

FRANK HAYGOOD,

Plaintiff, NO. CIVIL S-75-738 LKK

v. OPINION AND ORDER

EVELLE J YOUNGER, etc., et al.,

Defendants.

/

In Haygood v. Younger, 14 Cal.3d 802 (1975), the California Supreme Court determined that Frank Haygood had spent almost five years longer in prison than was permitted under the applicable law. After he was released he brought this suit under 42 U.S.C. § 1983, seeking damages against those he believed responsible for his wrongful incarceration. He predicated his claim upon asserted violations of both the due process clause of the fourteenth amendment and the cruel and unusual punishment provisions

of the eighth amendment, made applicable to the states under the fourteenth amendment.

After trial, the jury found that defendants Cranke and Seymour caused the plaintiff to be deprived of his constitutionally protected rights, and the court entered judgment accordingly.[1/] Those defendants have now moved for judgment notwithstanding the verdict pursuant to F.R.Civ.P. 50(b).[2/]

I

THE FACTUAL BACKGROUND

The facts relating to the plaintiff's various terms of imprisonment, and the miscalculation which led to his unlawful confinement are set forth in the California Supreme Court's opinion in In re Haygood, 14 Cal. 3d 802, 804-808 (1975). It is sufficient for the purposes of this opinion to note that the California Adult Authority erroneously determines that the plaintiff's properly imposed term for escaping from

prison did not begin to run until the plaintiff finished serving a term for a robbery which took place after the escape. The result of this miscalculation was that, in 1974, Frank Haygood found himself serving time in prison for a robbery term from which he had been "administrative[ly] discharged" as of 1969, and for an escape term from which he should have been discharged in 1969. Furthermore, although he was serving time, he was receiving no credit towards the escape term. With the help of another prisoner, Phillip Gaskill, the plaintiff began contacting prison and Department of Corrections authorities, asking how it was possible that he was not being credited for time served on this term.

In March, 1974, the plaintiff received responses to his inquiries from defendant Harold Cranke, a Records Officer at the prison, and defendant Benjamin Seymour, a

Records Officer for the California Department of Corrections. Their responses told the plaintiff, in effect, that his file had been reviewed and that he was lawfully incarcerated under the state's "continuous term policy." With Mr. Gaskill's aid, the plaintiff petitioned the California Supreme Court for a writ of habeas corpus. That Court determined in effect that plaintiff had been held unlawfully, at least since his terms were retroactively fixed in October, 1970. The Court issued the writ of habeas corpus and ordered the plaintiff released forthwith. In re Haygood, 14 Cal. 3d at 812.

The liability of the defendants Cranke and Seymour for plaintiff's excessive incarceration was submitted to the jury at the close of trial. The jury was instructed on both the due process and cruel and unusual punishment theories of liability and returned a general verdict against the defendants.

The defendants moved for judgment notwithstanding the verdict.

The defendants' chief contention in support of said motion is that the evidence at trial was legally insufficient to prove that defendants Cranke and Seymour intended to deprive plaintiff of his constitutional rights, and that any lesser showing fails to meet the state of mind requirement for a damages action based on the eighth and fourteenth amendments. The primary issue therefore, is what state of mind must the defendants have entertained in order to be liable for violating plaintiff's rights under the eighth and fourteenth amendments.

This issue is best analyzed in three parts: First, what state of mind, if any, is required by 42 U.S.C. § 1983 itself? Second, what showing is required when the statutory action is based on the fourteenth amendment's prohibition against deprivation of liberty

without due process? Third, what is the necessary showing for an action based on the eighth amendment's guarantee against cruel and unusual punishments. I will address each of these questions in turn; in doing so I will apply the ascertained rules to the specifics of this case. Finally, I will briefly discuss the defendants' claim that they are entitled to judgment non obstante veredicto based on their good faith defense.[3/]

II

PARRATT V. TAYLOR: MENTAL STATES AND THE REQUIREMENTS OF SECTION 1983

The starting point in my consideration of the defendants' motion is section 1983 itself. I conclude that the statute requires no particular state of mind on the defendants' part in order for liability to be imposed. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Nothing in the language of that statute either explicitly or implicitly requires that an aggrieved plaintiff prove anything regarding a defendant's state of mind. See Parratt v. Taylor, ___U.S.___, 101 S.Ct. 1908, 1912 (1981). The Supreme Court, however, has often discussed damage actions under section 1983 as lawsuits sounding in tort. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 418 (1976); Carey v. Piphus, 435 U.S. 247, 253 (1978); Monroe v. Pape, 365 U.S. 167, 187 (1961). Perhaps because most torts involve some form of culpable mental

state on the part of the tortfeasor (intent, recklessness, negligence, etc.), the lower courts struggled for years to determine what particular state or states of mind were required by this statutory "tort" action. See, e.g., Bonner v. Coughlin, 519 F.2d 1311 (7th Cir. 1975); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 197); Patzio v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); Arnold v. I.B.M. Corp., 637 F.2d 1350 (9th Cir. 1981). The result was an impossible tangle of diverse legal doctrines. See Parratt v. Taylor, ___ U.S.___, 101 S.Ct. 1908, 1911-12 (1981).

Over the course of two decades the Supreme Court loosed this knot, strand by strand. In Monroe v. Pape, 325 U.S. 167 (1961), the Court held that the civil cause of action provided by section 1983 -- unlike its criminal law counterpart (18 U.S.C. § 242) -- did not require a showing that the

defendant acted with the specific intent to deprive the plaintiff of constitutionally protected rights. In Baker v. McCollan, 443 U.S. 137, 139-40 (1979), the Court suggested that simple negligence could provide a basis for liability under section 1983. The following year, the Court emphasized that "[b]y the plain terms of section 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640 (1980). Finally, last term, the Supreme Court severed the remaining threads: in unambiguous terms it announced that there is no state of mind requirement for an action brought under 42 U.S.C. § 1983. Parratt v.

Taylor, ___U.S.___, 101 S.Ct. 1908, 1912-13 (1981).

In Parratt, an inmate of a Nebraska prison (Taylor) ordered a hobby kit by mail. Contrary to the prison's regular procedure the prisoner was not notified when the package containing the hobby materials arrived; when he inquired about his materials he was told tnat the package had been lost. The prisoner filed an action under section 1983, alleging that his fourteenth amendment rights had been violated.[4/] The district court held that by negligently failing to follow their own policies the prison officials had deprived the prisoner of his property without affording him due process of law. The district court granted the prisoner summary judgment and the Eighth Circuit affirmed, per curiam. 620 F.2d 307 (8th Cir. 1980). The Supreme Court granted certiorari in the case for the express purpose of

deciding "whether mere negligence will support a claim for relief under § 1983."U.S., 101 S.Ct. at 1911, 1912.

After setting forth the facts and posture of the case, the Court reviewed its own decisions in the area. It concluded that "[section 1983 ... has never been found by this Court to contain a state of mind requirement... Both Baker v. McCollan and Monroe v. Pape suggest that section 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any section 1983 action the initial inquiry must focus on whether the two essential elements to a 1983 action are present: (1) whether the conduct complained of was committed under color of state law; and (2) whether this deprived a person of rights, privileges or immunities

secured by the Constitution or laws of the United States." U.S., 101 S.Ct. at 1912-13. (Emphasis added).

It follows, of course, that the jury's verdict in the instant case is not susceptible to challenge on the ground that the plaintiff did not prove intent and thus failed to satisfy the state of mind requirement of section 1983. Once again, the Supreme Court has held that there simply is no such requirement. Having resolved this threshold question, I now examine whether the plaintiff presented sufficient evidence at trial to satisfy the two elements that are required by section 1983.

Without doubt, defendants Cranke and Seymour, while performing their tasks as state officials, were "acting under color of state law." Monroe v. Pape, 365 U.S. 167, 172-87 (1961); Parratt v. Taylor, ___U.S. ___, 101 S.Ct. 1913. "The defendants'

conduct was engaged in under color of state law if they were clothed with the authority of the State and were purporting to act thereunder []." Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962). The defendants in the instant case were both state employees. Both were charged with the responsibility of examining prisoners' records for the purpose, inter alia, of determining whether and when the prisoners were entitled to be released. Thus the first element of the action is satisfied.

The second element requires plaintiff to have established that the defendants deprived him, or caused him to be deprived, of some right protected by federal law. 42 U.S.C. § 1983; Gomez v. Toledo, 446 U.S. 635, 640 (1980); Parratt v. Taylor, supra. In the instant case plaintiff asserted that he was deprived of rights protected by the fourteenth amendment. He tendered to the jury

two different theories as to how he has been so deprived.

First, he claimed that insofar as he was confined in prison after his terms had run, he was deprived of his liberty without due process. Thus, in the Supreme Court's words, plaintiff alleges a violation of "the Due Process Clause of the Fourteenth Amendment simpliciter." Parratt v. Taylor, ___U.S. 101 S.Ct. at 1913. Second, he claimed that this unlawful incarceration amounted to cruel and unusual punishment and thus violated the rights guaranteed him by the eighth amendment. The application of eight amendment protections against the states is another constituent of due process under the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). It could be said, therefore, that plaintiff is following alternative routes from the same events to, perhaps, the same result. Because each constitutional

protection has its own standards, and thus the requisites for violation of each may vary, it is necessary to examine each in turn. In doing so, I will address the defendants' contention that there is some further state of mind requirement required for violation of either of the underlying constitutional claims.

III

THE DUE PROCESS SIMPLICITER THEORY

The more direct of plaintiff's section 1983 claims is that the defendants caused him to be denied his liberty without due process of law. Again, the Supreme Court has instructed the lower courts as to the specific prerequisites that the plaintiff must satisfy in order to prevail on his claim that he was divested of a protected interest without due process of law. After showing that the defendants were acting under color of state law, he must prove:

a. That the interest deprived was constitutionally protected (i.e., life, liberty, or property);

b. That the deprivation was without due process of law; and

c. That the charged defendants subjected him, or caused him to be subjected, to the deprivation. (See Parratt v. Taylor, ___U.S.___, 101 S.Ct. at 1913).

A. The Protected Interest

The first of these factors presents no obstacle to this plaintiff. It is manifest that Mr. Haygood was deprived of a protected interest: he lost no less than his liberty. After life itself, no right is more jealously guarded by our Constitution, legal system, and our cultural mores. Yet, as Justice Rehnquist stresses, "[t]he Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty 'without due process

of law.'" Baker v. McCollan, 443 U.S. at 145; Parratt v. Taylor, ___U.S.___, 101 S.Ct. at 1913. Indeed, for a number of years Frank Haygood was serving a sentence duly imposed by a court of law; there is no assertion that he was initially incarcerated without due process See, Meachum v. Fano, 427 U.S. 215, 224 (1976). After his term of lawful incarceration came to an end, however, the plaintiff remained in prison. It is that period of unlawful detention which gives rise to the present lawsuit, and it is upon that period the analysis must focus.

B. The Process Due

"Once it is determined that due process applies, the question remains what process is due." Morrisey v. Brewer, 408 U.S. 471, 481 (1972). At a minimum, the process due this plaintiff was to be sentenced and incarcerated only in the manner and to the extent prescribed by California law. There can be

no dispute, however, that the plaintiff was imprisoned for more than 4-1/2 years after his term, as fixed by state law, came to an end. It follows inevitably that "when his sentence expired, the State lost its power hold him, and ... his continued detention violate[d] his rights under the Fourteenth Amendment." McNeil v. Patuxent Institution Director, 407 U.S. 245, 246 (1972). In short, the plaintiff did not receive the pr cess due him.

The defendants argue that Parratt v. Taylor and Baker v. McCollan compel the opp site conclusion. As I shall now demonstrat the defendants confuse the result in a give case with it teaching. Thus, the Supreme Court applied essentially the same mode of analysis in Parratt that I have traced above. In that case, however, the Court concluded that Taylor had received the pro- cess due him on the facts of his case; thus

his claim was denied. On this basis, the instant defendants seek to argue that Haygood's claim must also be rejected. It seems elementary, however, that this court is not bound to deny all future section 1983 claims based on due process simpliciter simply because Mr. Taylor (or the plaintiff in Baker v. McCollan) failed to make out his cause of action. It is not the disposition of those cases which controls this lawsuit; rather it is the rules of law announced and how those rules were applied to the facts.

In Parratt, the Supreme Court -- after disposing of the question of mental states and section 1983 -- applied the factors outlined above to parse the plaintiff's due process claim. The Court determined that the defendants had acted under color of state law, that the plaintiff's hobby kit was "property" in the fourteenth amendment sense, and that plaintiff had been "deprived of

it.[5/] The Court then asked whether the plaintiff received the process due him. The process due Mr. Taylor, the Court held, was the opportunity to be heard "at a meaningful time and in a meaningful manner" at some time before Nebraska finally deprived him of his property. 101 S.Ct. at 1915 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). This did not mean, though, that the hearing had to take place before the hobby kit was lost; given that the property was lost inadvertently such a hearing obviously could not have been held. According to the Court, then, a hearing before property is seized (or lost) is not always required if the claimant has a "meaningful opportunity" afterward to regain his or her property, or its equivalent. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). In Mr. Taylor's case, the Court noted, Nebraska had a torts claims statute under which the plaintiff could have

sued for his hobby kit or its value. 101 S.Ct. 1917. Thus, the Court concluded, the plaintiff in Parratt had been afforded all the process that was due him (indeed that was possible to accord him) before being finally deprived of his property. Id.

The defendants point out that in Parratt, the Supreme Court found that the hearing held after the claimant was deprived of certain property interests was sufficient to satisfy due process They argue that a post-deprivation hearing should also be sufficient to satisfy due process when what is at stake is a deprivation of liberty. Thus, the defendants contend, because California has a tort claims statute under which the plaintiff could have sued,[6/] he was foreclosed from bringing this section 1983 action in the federal courts.

This argument, although it is seductive initially, fails to make the crucial

distinction between the right guaranteed to plaintiff by the Due Process Clause, and the remedy which is available to him if that right is breached. The issue that is tendered here is whether the plaintiff's rights were violated, not whether he has a remedy at law for the injury caused him by that violation. That is not to say that the efficacy of a post-deprivation hearing to remedy the injury is not pertinent -- that is a factor in considering whether due process has been accorded it is, however, not the relevant factor in this case.

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin wit@ a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961);

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Applying this rule to the instant case, it is clear that the plaintiff was due a hearing before he was imprisoned for a term of years; clearly the plaintiff received such a hearing before he was committed to Folsom in the first instance. But that is the beginning, not the end of the inquiry. It follows from the fact that the plaintiff received a hearing and was lawfully confined that he had a correlative due process right to be released from prison when his lawfully fixed term of imprisonment expired. McNeil v. Patuxent Institution Director, 407 U.S. 245 (1972); Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969); Speaks v. McGregor, 355 F.Supp. 1129 (W.D. Va. 1973).

Thus a properly focused analysis reveals that the process to which Mr. Haygood was entitled was to have his liberty restored him at the precise moment fixed by state law. In

Parratt, by contrast, the Court held that plaintiff's interest was solely to receive his property, and thus a post-deprivation hearing would suffice, since that process would restore the property itself or its functional equivalent -- its value in money. It should go without saying that money is not the equivalent of months of one's life spent in prison.

Even if due process could have been satisfied by providing Frank Haygood a hearing, a hearing held after he was released would not suffice. As Parratt teaches, the Constitution requires a hearing before the claimant is finally deprived of his interest. 101 S.Ct. at 1908. On these facts, a post-deprivation hearing simply does not and cannot meet that requirement, since once liberty is gone it can never be recovered. Money is compensation for liberty denied; money is not liberty itself. It seems clear,

therefore, that the tort action supplied by the state simply will not satisfy due process when what was required was the timely release of the plaintiff.

Moreover, holding that a tort remedy is all the process due for a deprivation of liberty under the facts of this case would be unsatisfactory for another reason.

Defendants' argument suggests that government officials are permitted under the Due Process Clause to incarcerate individuals for any reason they wish or no reason at all as long as the state later pays those individuals for their lost time. To state the result of the argument is to answer it. Yet this reductio ad absurdum is useful to illustrate that what is at issue here is the nature of the constitutional right guaranteed. The effect of these guarantees is presumably to set a standard of conduct for government officials.

One hopes and expects that most government officials will conform their conduct to these constitutional standards; but for this to happen, it must be clear what is required, not just what the remedy is for the occasional breach.

Finally, the notion that underlies the defendants' argument is simply inconsistent with applicable precedent. In effect, what the defendants propose is no more than a disguised requirement that a plaintiff must exhaust state remedies before bringing a section 1983 action based on due process simpliciter. That proposal ignores two decades of case law as well as the history of the statute itself. In Monroe v. Pape, 365 U.S. 167 (1961), after a lengthy discussion of the statutory history, the Supreme Court concluded that section 1983 was not intended merely as a remedy that would stand behind those provided by the states, to come into

play only when the state remedies fail to function. Rather, the Court said:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and reissued before the federal one is invoked.

365 U.S. 183. See also Comment, Actionability of Negligence Under § 1983 and the Eighth Amendment. 127 U.Penn. L.R. 533, 554-555 (1978).

In sum, the existence of a state tort cause of action does not establish that Frank Haygood was afforded due process when he was deprived of his liberty, nor does it bar his lawsuit under section 1983. Accordingly, the question was properly submitted to the jury. Nonetheless, defendants argue the jury's verdict cannot be allowed to stand since, they assert, even if there is no mental requisite under the statute, the constitutional provision implicates such a

requirement. This argument, as I explained below, must also fail.

C. Subjects or Causes to be Subjected

Defendants contend that they cannot be held liable unless plaintiff has shown that they intentionally acted to deprive him his liberty.[7/] Alternatively, defendants argue that regardless what standard is applied there was not sufficient evidence for the jury to have found them liable. Neither of these contentions has merit. Once the plaintiff demonstrated that he was deprived of liberty without due process, the only thing he needed to prove regarding these defendants was that they subjected him or caused him to be subjected to the deprivation. The plaintiff introduced evidence sufficient to meet this standard.

I have already noted that section 1983 itself contains no suggestion of a state of mind requirement. Neither can I discern

anything in the language of the fourteenth amendment's Due Process Clause that in any sense implies that a person is not "deprived" of his or her rights unless another intentionally (or negligently for that matter) caused the deprivation. Simply put, the idea that a state of mind requirement is implicit in the Due Process Clause accords with neither its plain words, nor its purpose. The purpose of the great provisions of the fourteenth amendment is to protect the rights of the individual -- not to impose punishments on individuals who are "guilty" of violating those rights. Clearly, the fact that the statute imposes liability for violations of the Constitution, does not change the character of the constitutional provision itself. Since, as I have shown, the statute prohibits any violation of the Constitution under color of state law, the notion of "moral guilt or blame" that underlies the

requirement of intent in tort is wholly irrelevant. See Prosser, Law of Torts, 16 (4th ed. 1971).

Nor did the Supreme Court. in Parratt, imply an intent requirement into the underlying constitutional claim. In fact, the majority opinion specifically noted that the deprivation to the plaintiff in that case was no less a deprivation for having been negligently caused.[8/] Justice Powell, it is true, suggests in his concurring opinion that a state of mind requirement may exist he argues that: "A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." 101 S.Ct. at 1919 (Footnote omitted). Nonetheless, neither the majority, nor any of the four other justices who chose to write separate opinions, joined him in this view.

What remains, therefore, is for the court to determine whether the jury could reasonably conclude that defendants Cranke and Seymour subjected the plaintiff or cause him to be subjected to the ascertained deprivation of his federally protected rights. See Yeaman v. United States, 584 F.2d 322, 326 (9th Cir.1978). The evidence showed that both defendants were charged with the responsibility of determining when inmates were to be released. Both received letters from the plaintiff protesting the computation of his sentence. Each defendant made a brief inquiry into the plaintiff's situation, determined that he was serving consecutive terms, and that the Adult Authority had fixed his release date at some time in the future.

Defendant Cranke sent the plaintiff a two line response on a slip of paper informing him that "all terms are tied together. He attached a California Attorney General's

opinion stating that "[c]onsecutive sente
are considered as one continuous term and
'neither shall expire until each are
completed.'" Defendant Seymour sent the
plaintiff a brief letter containing the s
information, to which he attached the sam
opinion.[9/]

Clearly it was not what the defendant
did that makes them liable to the plainti
it was what they failed to do. As the Ni
Circuit has taught:

> A person 'subjects' another to t
> deprivation of a constitutional right
> within the meaning of section 1983, i
> he does an affirmative act, participa
> in another's affirmative acts, or omi
> to perform an act which he is legally
> required to do that causes the depriv
> tion of which complaint is made."

Johnson v. Duffy, 588 F.2d 740, 743 (9th
1978) (Emphasis added); see also Sims v.
Adams, 537 F.2d 829 (5th Cir. 1976). Whe
what is involved are acts of commission o
omission, the question is: was the defen
dants' conduct a legal cause of plaintiff

deprivation? Arnold v. International Business Machines, 637 F.2d 1350 (9th Cir. 1981). There was ample evidence showing that both defendant Cranke and defendant Seymour were legally required to correctly compute the plaintiff's sentence and to set in motion the process that would lead to his timely release.[19/]

The jury reasonably could have found that these men were charged with ensuring that the plaintiff was either serving the sentence lawfully meted out to him or was released from confinement. The defendants protest, though, that it was not their actions or omissions which caused the plaintiff's unlawful imprisonment; rather, it was a miscalculation made years before by the Adult Authority. It is true that these defendants cannot be liable for the initial period of unauthorized incarceration. In March, 1974, however, the plaintiff's letters put them on

notice that something was wrong with his sentence; the period for which the defendants are liable spans from that time until his release, approximately seventeen months later. They are being held to answer not for the mistakes of others, but for their own failure to look past those mistakes, make the necessary calculations, and see to it that the defendant was freed. Johnson v. Duffy, supra.

In this regard, the defendants point out that the letters they received failed to raise the specific grounds on which the California Supreme Court eventually ordered the plaintiff released. Thus, they argue, they were never put on sufficient notice to invoke their duty independently to recompute the plaintiff's sentence.The answer, of course, is that the assertion is one of fact for the jury. Neither the plaintiff nor the other prisoner aiding him were attorneys;

these prisoners had at best limited access to the appropriate material regarding sentencing standards.The jury could reasonably believe that the plaintiff could not be expected to do more than to inform the appropriate authorities that there was something wrong with his sentence.It was the defendants who had the expertise, the full access to records, standards and statutes, and who were charged with the responsibility of enforcing the law. Certainly the jury could have found that these defendants had sufficient notice but nevertheless failed to execute their duties.

Finally, the defendants argue that they are only charged with failure to investigate, and that under Baker v. McCollan, 443 U.S. 137 (1979) they cannot be held liable on that basis. Once again, the defendants confuse the outcome of the case with the rules of law announced in it. An examination of the facts

and principles in Baker requires me to reject the defendants' argument. In Baker, one Leonard McCollan was arrested on narcotics charges and presented a drivers license as identification. The license had been issued to his brother, Linnie Carl, but bore Leonard's picture. Leonard was booked, signed a number of documents, and was released on bail using his brother's name. When Leonard subsequently failed to appear the bondsman sought and obtained a warrant for Linnie Carl's arrest. Linnie Carl was taken into custody on the warrant and was held -- despite his protests of mistaken identity -- for several days. After the officials finally released him, Linnie Carl brought a section 1983 action against the sheriff who operated the jail. The district court directed a verdict for the defendant; however, the Court of Appeals for the Fifth Circuit reversed, stating that Linnie Carl

McCollan had made out a claim for a "[§] 1983 false imprisonment action. 443 U.S. at 141-142.

The Supreme Court reversed the Court of Appeals, holding that although the plaintiff may have stated a tort claim for false imprisonment, he did not state a cause of action under section 1983 for denial of liberty without due process. The analysis was basically the same one the Court later employed in Parratt: the plaintiff had been deprived and the deprivation was of a protected interest; the question, again, was whether his liberty was denied without due process. The Court concluded that Linnie Carl had received all the process due him. He had been arrested pursuant to a valid warrant and upon probable cause. He was not denied his right to a speedy trial at which time (if no sooner) he could establish his innocence. Thus, unlike Frank Haygood, Linnie Carl

McCollan was being held lawfully, under the authority of state law. 443 U.S. at 143-146.

The defendants in the present case attempt to make much of language in Baker that the Constitution did not impose a duty on the sheriff, when executing a valid arrest warrant, "to investigate independently every claim of innocence...." Id. at 146. However true that statement may be, it does not follow that a public official never has a duty to investigate, nor that in this case defendants Cranke and Seymour did not have a duty to investigate Frank Haygood's claims of unlawful detention. Indeed, according to their job descriptions that was precisely their duty. Moreover, the Court prefaced its statement in Baker by pointing out that "[a] reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers -- all of whom may be potential defendants in a § 1983 action -- is

entirely consistent with 'due process of law.'" Id. at 145. In other words, the sheriff's duty was only to arrest and detain the plaintiff in a lawful manner. Once the sheriff had "probable cause" he had discharged his duty. It was not the sheriff's job to determine whether the plaintiff was in fact innocent of the charges on which he was held, or to decide whether he should have been released: that responsibility fell to the magistrates and judicial officers. By contrast, in the instant case the jury could have found that it was the duty of Cranke and of Seymour to ascertain Frank Haygood's term of imprisonment and to see to it that he was released at the end of his term. The jury reasonably could have found that defendants' duty was not performed.

To sum up, the plaintiff adduced sufficient evidence from which the jury could

conclude that: (a) the plaintiff was deprived of his liberty; (b) the deprivation occurred without due process of law; and (c) that these defendants subjected plaintiff to the deprivation, or caused him to be subjected to it. Thus plaintiff did all that was required to prove a section 1983 claim based on due process simpliciter. As I have explained, neither section 1983 nor the Due Process Clause of the fourteenth amendment requires plaintiff to make any specific showing regarding the defendants' states of mind.

The requirements for plaintiff's cause of action properly focus only on the questions of constitutional harm and causation. In this sense the statute imposes liability regardless of fault. Nonetheless, judicial gloss has provided the defendants with relief from the rigors of the statute. The courts have recognize that officials are not

susceptible to liability under section 1983 if they can show that they acted reasonably and in good faith. The defendants' contentions in this regard will be addressed in Part V of this opinion. First, however, I will discuss the sufficiency of the plaintiff's claim to the extent that it relies on the eighth amendment.

IV

THE EIGHTH AMENDMENT THEORY

As a second theory of liability, the plaintiff argued that his incarceration in the maximum security prison at Folsom after his term had ended constituted cruel and unusual punishment. Thus, plaintiff maintained, to the extent that the defendants were responsible for his continued unlawful imprisonment, they caused him to be deprived of his rights under the eighth amendment.[11]/

At trial this court instructed the jury that:

> In order to find plaintiff has been subjected to cruel and unusual punishment you must find that defendants, or any of them, by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment.

The defendants contend that there was not sufficient evidence for the jury to find that they violated Frank Haygood's eighth amendment rights, and that they are thus entitled to judgment notwithstanding the verdict as to this theory of liability.[12/] I conclude that there was sufficient evidence to support a finding by the jury that defendants Cranke and Seymour intended to punish the plaintiff. In the usual case, that would end the court's discussion of this portion of the defendants' motion.

This is a somewhat unusual case, however, for it involves a number of issues that lie at the heart of section 1983 litigation. One of those issues is whether a plaintiff who complains of cruel and unusual punishment

must demonstrate that the parties sued in any sense "intended" to deprive him of his eighth amendment rights. The instant motion allows the court the opportunity to consider this issue free from the pressures of trial, which include the need to make immediate decisions on legal issues. This more deliberate consideration leads me to believe that, even if eighth amendment violations are by definition intentional acts, it need not be proved that the defendants themselves bore that intent. All that the plaintiff must show is that the defendants caused the deprivation to occur.[13/] Before discussing in detail the question of intent under the eighth amendment, however, I will address the particular objection raised by the defendants.

A. The Sufficiency of the Evidence Proving Intent

The defendants' argument here seems to proceed from the premise that they could be held liable only if they specifically

intended to confine the plaintiff. They protest that they had neither the desire nor the power to so harm the plaintiff. The argument misconstrues the meaning of "intent" as that concept applies to the case at bar.

On at least one point the law is quite clear: the plaintiff was not required to show that defendants had the specific intent to deprive the plaintiff of his constitutional rights. Monroe v. Pape, 365 U.S. at 187. Rather, the defendants are held to have intended the consequences substantially certain to follow from their acts and omissions. Procunier v. Navarette, 434 U.S. 555, 566 (1978) (citing Restatement, Second, of Torts, § 8A); see also Prosser, supra, pp. 31-32. The evidence shows that defendants Cranke and Seymour, despite their duty (and power) to inform the appropriate authorities that the plaintiff was entitled to be released, failed to do so. The result, which the defendants

knew was substantially certain to occur, was that the plaintiff remained in prison. The jury could reasonably have found that the defend intended to confine the plaintiff, and that they thus subjected him to cruel and unusual punishment.[14/] As I suggested, however, it is unclear that the plaintiff in the present case was even required to make such a showing of general intent.

B. Intent and the Eighth Amendment

The proper role played by intent in a claimed eighth amendment violation has recently received attention from the courts. Thus, in a setting different from the instant case the Supreme Court has suggested that, in the context of the constitutional amendment, the word "punishment" signifies harm inflicted purposefully -- generally as part of the criminal sanction. Bell v. Wolfish, 441 U.S. 520, 536-540 (1979). Nonetheless, the Ninth Circuit subsequently held that

intent to punish is not a necessary compon
of an eighth amendment claim under section
1983. Spain v. Procunier, 600 F.2d 189, 1
(9th Cir. 1979). This seeming inconsisten
is readily resolved by examining the cases
the context of the statute and the underly
constitutional claim. Read together, the
cases teach that, at most, what is require
in a section 1983 action based on the eigh
amendment is that the defendants intended
punish the plaintiff or that they caused
another person intentionally to inflict ha
on the plaintiff, and that the harm inflic
was cruel and unusual.

The instant case is an excellent illustration of this point. First, there be no doubt that the unlawful detention of Frank Haygood at Folsom Prison was "punish ment" in the constitutional sense. Hutto Finney, 437 U.S. 678, 685 (1978). Obvious someone was keeping the plaintiff in prisc

purposefully in order to impose what they (wrongly) perceived to be an appropriate criminal sanction. The defendants do not dispute that, to the extent that the plaintiff's incarceration was unwarranted, it was also "cruel and unusual." (See my discussion, infra). The necessary conclusion, then, is that the plaintiff was subjected to a deprivation of his rights under the eighth amendment.

Second, assuming the jury predicated its award on eighth amendment grounds, the question of causation was resolved by the jury against these defendants. It was not necessary for the plaintiff to show that these defendants were the persons who subjected him to the deprivation; i.e., that they were the ones who purposefully inflicted harm upon him. "The requisite causal connection can be established not only by some kind of personal participation in the deprivation,

but also by setting into motion a series of acts by others which the actor knows or should know would cause others to inflict the constitutional injury." Johnson v. Duffy, 588 F.2d at 743-744. I have already discussed the evidence showing that defendants Cranke and Seymour had a duty to determine the plaintiff's release date, and that by failing to execute that duty the defendants caused the plaintiff's continued and illegitimate incarceration. Hence the jury could have found that the defendants, by failing to execute their responsibilities, caused the plaintiff to be subjected to a deprivation of his eighth amendment rights. That is all that is required of plaintiff under this theory of section 1983 liability.[15/] Thus, the analysis of the eighth amendment claim like the fourteenth amendment claim, supra), turns wholly on the questions of deprivation and causation. Nonetheless,

the defendants maintained and this court accepted that the eighth amendment itself implicates some mental state into the plaintiff's cause of action. My acquiescence in the defendants' request to give the intent instruction rested in part on a hurried reading of Estelle v. Gamble, 429 U.S. 97 (1976). A closer examination, however, convinces me that the Supreme Court's holding in Estelle did not require the plaintiff in the instant lawsuit to make any showing as to the defendants' states of mind.

C. Estelle v. Gamble: The Significance of the Phrase "Cruel and Unusual."

In Estelle, an inmate of the Texas Department of Corrections brought a section 1983 action against, inter alios, the Medical Director of the prison in which he was confined. The essence of his complaint against the doctor was that due to the negligence of the doctor and his staff, the prisoner had

been given inadequate medical treatment. This alleged professional negligence, the prisoner claimed, constituted cruel and unusual punishment.

The Court traced the evolution of "cruel and unusual punishment" as a constitutional standard, and discussed how that standard had been applied to the medical treatment of prisoners. Even given a liberal reading of the term "cruel and unusual," the Court concluded,

> [m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.

429 U.S. at 106.

I have already noted that in this case, unlike Estelle, the was evidence that the defendants intended to deprive the plaintiff of his eighth amendment rights. Moreover, in

Estelle, unlike the instant case, there was no suggestion that the defendant doctor caused anyone else to punish the prisoner. Although Estelle is thus easily distinguishable from the case at bar, the fact remains that the Supreme Court's opinion has been given a broad reading in regard to the state of mind requirement, and thus merits an examination on its own terms.

Estelle, like the present case, involved an eighth amendment claim by a prisoner who alleged that he was injured as a result of an official's breach of duty. The resemblance between the cases is entirely superficial, however, for Estelle addressed a very different set of issues than those raised in the present case. The heart of the question in Estelle was whether the alleged negligent medical treatment suffered by the prisoner in itself transformed lawful punishment into "cruel and unusual" punishment. The Court

held it did not. Medical malpractice, unfortunately, is a risk run by every patient whether the patient is in prison or in a penthouse. The fact that a prisoner must run the same risks as the population at large is not, in the Supreme Court's words, "repugnant to the conscience of mankind." 429 U.S. 106; quoting Lousisiana ex rel Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring). Estelle held, in short, that medical malpractice does not per se make otherwise legitimate punishment "cruel and unusual." Nonetheless, the Court noted that a prisoner, unlike persons who are free, "must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." 439 U.S. 103. It is this necessary reliance which in an appropriate case can transmute deliberate indifference (which in the case of free person would be no more than tortious

conduct) into cruel a unusual punishment. Because the state must provide medical care sufficiently adequate to conform to "the evolving standards of decency that mark the progress of a maturing society" (429 U.S. 102, quoting Trop v. Dulles, 356 U.S. 101 (1958)), a conscious failure to do so constitutes cruel and unusual punishment. For the same reason "deliberate indifference" must likewise be so condemned. Negligence on the other hand is a risk of treatment all persons suffer in common.[16/] Only deliberate indifference to the prisoners' medical needs would put them at a greater risk than they suffer outside and thus only such reckless medical treatment could make otherwise legitimate penal servitude "cruel and unusual."

Some commentators have suggested that Estelle v. Gamble is significant only in cases of medical maltreatment of prisoners. See, e.g., Comment, Actionability of

Negligence Under § 1983 and the Eighth Amendment, 127 U.Penn Law Review 533, 565-575. Regardless of whether the Estelle holding can be extrapolated to situations outside of the medical malpractice context, it clearly does not apply to the case at bar. The harm done to the plaintiff did not result from a risk of everyday life. As I have explained, Frank Haygood's unlawful confinement was punishment, and there was sufficient evidence for the jury to find the defendants in part responsible for its unlawful continuation. The central issue in Estelle was whether permissible punishment became "cruel and unusual"by virtue of the doctor's failure to act. That is hardly an issue in this case: there can be little doubt that the punishment endured by this plaintiff, after he should have been released was "cruel and unusual." In this context, it is not relevant whether lawful confinement at

Folsom Prison is by nature "cruel and unusual." As the Court said in Robinson v. California: "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 660, 667 (1962). Once Frank Haygood served the sentence imposed by law, he had as much right to be free as any other person; he was no longer being punished for any crime whatsoever. The jury could have concluded that the long months of unsanctioned confinement suffered by this plaintiff constituted "cruel and unusual punishment," regardless of what the defendants intended. Once again, there was sufficient evidence of the defendants' intent. Moreover, to the extent that the defendant caused such an injury to the

plaintiff, they were liable to him under section 1983.

V

THE AFFIRMATIVE DEFENSE OF GOOD FAITH AND REASONABLENESS

In the foregoing analysis I have emphasized that neither section 1983 nor the underlying constitutional claims requires any showing by the plaintiff regarding these defendants' states of mind. By its terms, then, the statute makes those defendants subject to liability regardless of fault for any actions or omissions so long as they have caused injury to the plaintiff's protected interests. The courts, however, have held that it would be neither fair nor sound social policy to subject public officials to strict liability under section 1983. Accordingly, the Supreme Court has announced a qualified immunity from liability damages in section 1983 actions. Wood v. Strickland,

420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). This qualified immmunity was extended to prison officials in Procunier v. Navarette, 434 434 U.S. 555 (1978).

The immunity is properly characterized as an affirmative defense (Gomez v. Toledo, 446 U.S. 635, 640 (1980)); accordingly, as the defendants concede, they bore the burden of proof on this issue.[17/] While a judgment notwithstanding the verdict may be granted for a party bearing the burden of proof, the standard is somewhat recast: The court must conclude "that as a matter of law the evidence was capable of only one interpretation." Juhnke v. EIG Corp., 444 F.2d 1323, 1325 (9th Cir. 1971). Thus such a motion should be granted "[o]nly in an exceptional case." Id.; see also Wright & Miller, Federal Practice and Procedure: Civil § 2535 (1971).

Granting the defendants' motion in the instant case would signify that the only conclusions that could be drawn from the evidence are: (1) that the defendants acted entirely in good faith, and (2) that the defendants reasonably believed that the action they took was appropriate. Procunier v. Navarette, supra, 434 U.S. at 562; Scheuer v. Rhodes, supra, 416 U.S. at 247-48. The defendants argue that they harbored no ill-will towards the plaintiff, and that the "good-faith" prong of the test is made. Assuming arguendo that the evidence on ill-will is conclusive, I cannot agree, however, that as a matter of law the defendants acted reasonably when they responded to the plaintiff's inquiries. There is evidence that the defendants made only a cursory check the plaintiff's records; their written responses to him were terse and oblique. They undertook no further investigation, nor did they

seek to institute a hearing or other administrative procedure to determine if the plaintiff should have been released. The jury, after evaluating this evidence, could reasonably have decided that the defendants' conduct was not reasonable under the circumstances.

The defendants refer to the testimony of one of their colleagues who said, in effect, that no records officer would have done more than the defendants did. Such evidence, even if believed, raises at best an inference that what the defendants had done was reasonable; the jury was free to come to the opposite conclusion. In the words of Mr. Justice Holmes: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470 (1903).

Similarly, the defendants make much
the fact that it was not until a year an
half after they wrote to Mr. Haygood tha
California Supreme Court decided that th
plaintiff was being held unlawfully.
Certainly, if the defendants' responses
come after the issue had been adjudicate
they would have been foreclosed by law f
asserting this defense. Wood v. Strickl
supra, 420 U.S. at 322; Johnson v. Duffy
supra, 588 F.2d at 745. The fact that t
defendants are not negligent as a matter
law though, does not mean that they acte
reasonably. This is not a case where th
defendants were "charged with predicting
future course of constitutional law."
Pierson v. Ray, 386 U.S. 547, 557 (1967);
also Benson v. Hightower, 633 F.2d 869 (9
Cir. 1980). Rather, the plaintiff prese
credible evidence that the defendants, a
being put on notice, simply refused to

investigate a computational error. In like fashion defendants' reliance on the Attorney General's opinion is of no avail. As defendants themselves repeatedly argued during the course of the trial, it was not the application of the "continuous term" policy to plaintiff's case which caused the harm, but the failure to perceive which of two terms preceded the other. The Attorney General's opinion dealt only with the continuous term policy and thus was wholly irrelevant to plaintiff's plight.

The question of the reasonableness of the defendants' conduct was a matter for the jury to decide. There was ample evidence for the jury to conclude that the defendants did not act in a reasonable and prudent manner given the totality of the circumstances. Among those circumstances was the fact that another person's freedom hung in the balance.

VI

CONCLUSION

The plaintiff presented sufficient evidence for the jury to conclude that defendants Cranke and Seymour caused the plaintiff to be subjected to a deprivation of the rights guaranteed him by the fourteenth amendment to the Constitution. Frank Haygood's confinement at Folsom Prison, after he had completed the sentence imposed upon him, constituted a deprivation of liberty without due process of law, and could be viewed as cruel and unusual punishment. The defendants acted under color of state law, and the jury could reasonably have concluded that the acts or omissions of the two officials caused the deprivation of the plaintiff's rights during the last seventeen months of his confinement. Thus the plaintiff fulfilled all the requirements for a section 1983 action brought to vindicate his

rights under the eighth amendment and the Due Process Clause of the fourteenth amendment. The plaintiff's evidence was not insufficient for failure to prove the defendants' intent, for no such state of mind showing is required.

The defendants did have an opportunity to demonstrate that they acted reasonably and in good faith, and thus argue that they were not liable. The evidence presented, however, did not preclude the jury from finding that the defendants acted unreasonably and were not immune from damages.

For the reasons stated, the defendants' motion for judgment notwithstanding the verdict is denied.

IT IS SO ORDERED.

DATED: November 30, 1981.

LAWRENCE K. KARLTON
U.S. District Judge

FOOTNOTES

1/ The plaintiff sought recovery against the state Attorney General, the nine members of the California Adult Authority, the Director of the state Department of Corrections, the warden of Folsom State Prison, the Administrative Officer for the Adult Authority, a correctional counselor at the prison, and defendants Cranke and Seymour. Pursuant to various pretrial motions, the claims against the Attorney General, the Adult Authority members and the Director were dismissed before trial by the Hon. Thomas J. MacBride. During the pendenc of this litigation, Judge MacBride assumed Senior status and the case came to the autho or this opinion to be tried. At the close o plaintiff's case, this court directed that verdicts be rendered in favor of the Warden, the Correctional Counselor, and the Administrative Officer, but denied the motio for directed verdict as to defendants Cranke and Seymour.

2/ The parties have brought on several post-trial motions. This opinion deals only with the defendants' motion for judgment not withstanding the verdict. The balance of th matters present by the parties, as well as the procedural issues, are resolved in an accompanying unpublished memorandum order. My reasons for so limiting the instant published order are explained in this court opinion in Kouba v. Allstate Insurance Co., ___F.Supp.___, Civil S-77-99, Slip Op. at 2, n.2 (E.D. Cal. September 3, 1981).

3/ Plaintiff's erroneous contention that defendants' motion is not timely is disposed of in the unpublished companion opinion. See n.2, supra.

4/ The fourteenth amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5/ The Court carefully noted that "the alleged loss, even though negligently caused, amounted to a deprivation." 101 S.Ct. at 1913.

6/ California Government Code § 810, et seq.

7/ A strong argument could be made that the defendants did in fact intend to deprive the plaintiff of his liberty. See Part IV infra.

8/ See note 5, supra.

9/ The defendants' reliance on the Attorney General's opinion is considered further in my discussion of the "good faith" defense, supra.

10/ According to defendant Seymour's job description, he "Plans, organizes, and directs the work and takes action on difficult problems in connection with ... the compilation of inmate case histories; directs the maintenance of individual inmates' files on a current basis; directs the review, evaluating, and summarizing of documents for

(Footnote 10 continued)

inclusion in records and case summaries and personally handles the more difficult cases directs the review, defining, and recording of terms and sentences shown in commitments and determines schedules on each case to carry out court orders and other legal and administrative provisions relating to the receipt, custody, and release of inmates; initiates and directs correspondence on legal and casework records; ... directs the computations necessary to determine legal date of parole and discharge of inmates...."

Similarly, defendant Cranke's job description states that he "Plans, organizes and assigns work and takes action on difficult problems in connection with ... the compilation of inmate case histories; directs the maintenance of individual inmates' files on a current basis; directs the review, evaluating, and summarizing documents for inclusion in records and case summaries and personally handles the more difficult cases reviews, defines and records terms and sentences shown in commitments and determines schedules on each case to carry out court orders and other legal and administrative provisions relating to the receipt, custody and release of inmates ... performs computations or supervises the making of computations necessary to determine the legal date of parole and discharge of inmates....

11/ The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

12/ Because the jury returned a general verdict, if one theory of liability is insufficient under the law a new trial may be required. Morrissey v. National Maritime Union, 544 F.2d 19, 26-27 (2d Cir. 1976); Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 967-68 (3d Cir. 1979); cert. denied 444 U.S. 833 (1980).

13/ Although it follows from this conclusion that the instruction given may have been more generous to the defendants than the law required, it did not result in prejudice to either party. Given that the eighth amendment claim was only an alternative theory or liability, and did not represent a separate item of damages, the instruction did not harm the plaintiff for he prevailed nonetheless. Obviously the favorable instruction did not prejudice the defendants.

14/ The meaning of the term "cruel and unusual" as it relates to this case is discussed at length in Part IV, Section C, infra.

15/ As I have already noted, the Johnson v. Duffy formulation is another way of expressing "legal cause." Once a proper instruction is given it is a question of fact for the jury to determine if the circumstances of the case are sufficient to meet the legal standard.

16/ Under this analysis the hiring of a doctor known to be incapable of maintaining the standard of care might well give rise to a claim under the eighth amendment even if the immediate cause of injury was that doctor's mere negligence.

17/ As I have pointed out in another context, the unfortunate phrase "burden of proof" has two distinct and oft-confused meanings. Kouba, n.1, supra, Slip Op. at 6. It may indicate who bears the burden of persuading the jury as to a given issue, or it may simply refer to a party's duty to produce enough evidence to make a prima facie showing. The reasoning in Gomez suggests that a defendant to a section 1983 suit bears both burdens when presenting an affirmative defense of good faith and reasonable conduct. The holding in Gomez, however, only reached the issue of the burden of production. (Justice Rehnquist wrote a brief concurrence specifically to emphasize that fact.) The better view is that the section 1983 defendant has both the burden of pleading and of proving his or her qualified immunity. See Nahmod, Civil Rights and Civil Liberties Litigation: § 8.13 (1979, with 1981 supplement), and cases cited therein. the instant case, the defendants have conceded in their briefs to the court that they bore the burden of persuasion as to this defense. Moreover, on the basis of the evidence presented, the defendants would not be entitled to judgment notwithstanding the evidence even if they did not bear the burden of persuasion as to this issue.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANK HAYGOOD, Plaintiff, v. EVELLE J. YOUNGER, etc., et al., Defendants.	No. Civil S-75-738 LKK ORDER

This is a civil rights action brought under 42 U.S.C. § 198 The plaintiff, Frank Haygood, was a prisoner at Folsom State Prison in California; due to a miscalculation by state officials, the plaintiff spent more than 4 1/2 years in prison after the state's authority to confine him came to an end. After he was released, the plaintiff brought

the instant lawsuit against a number of state functionaries whom he believed responsible for his unlawful confinement. The case was tried before a jury which found two of the defendants liable for causing the plaintiff to subjected to a deprivation of his constitutional rights.

I now consider various post-trial motions brought on by the parties. An accompanying, published opinion deals with the merits of the defendants' motion for judgment notwithstanding the verdict. In this opinion I shall address the question of the timeliness of that motion. I shall also discuss both the timeliness and the substance of several motions made by the plaintiff: a motion for a new trial on damages; a request for attorney's fees and a request for costs: and, lastly, a motion made before the Court of Appeals requesting

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that the defendants be required to pay the costs of their own transcript on appeal.

The facts regarding the plaintiff's unlawful incarceration are detailed in the California Supreme Court's opinion in In re Haygood, 14 Cal. 3d 802 (1975), and the facts and issues relating to the defendants' liability are discussed at length in the opinion which accompanies this order (Haygood v. Younger, _____ F.Su , Civil S-75-738 (E.D. Cal. November 30, 1981)). It is not necessary here to reiterate that material. What is pertinent, however, is some discussion regarding the procedural posture of this lawsuit. In particular, it is important to dissipate the apparent confusion regarding the entry of final judgment, for the date on which judgment was entered is obviously relevant to the disputes regarding the timeliness of the various post-trial post-trial motions.

I

THE PROCEDURAL HISTORY

On November 13, 1975, the plaintiff filed this action, seeking damages and declaratory relief pursuant to 42 U.S. C. § 1983 he also included a pendant state law tort claim for false imprisonment. There were originally 16 named defendants to the lawsuit: the State Attorney General; the Director of the State Department of Corrections: the nine members of the California Adult Authority; the Administrative Officer of the Adult Authority; the Warden of Folsom State Prisoner; a correctional counselor at the prison; a records officer at the prison; and a records officer for the Deparment of Corrections. The case was assigned to the Honorable Thomas J. MacBride, District Judge.

Over the next four years, Judge MacBride dismissed all of the claims save and

except the section 1983 cause of action for damages, which he let stand only against the Administrative Officer (Joseph Spangler), the Warden (Jacob Gunn), the correctional counselor (Richard Wipf), and the two records officer (Harold Cranke and Benjamin Seymour, respectively). In accordance with F.R.Civ.P. 54., no judgment was entered in favor of the defendants against whom all claims had been dismissed. Judge MacBride then assumed senior status; on Septmeber 5, 1979, the case was reassigned to the undersigned.

During the following year and a half, the parties brought several rounds of dispositive motions, and settlement and pretrial conferences were held. The case was tried before a jury commencing on June 2, 1981. At the close of the plaintiff's case-in-chief, this court directed verdicts in favor of defendants Spangler (the Administrative Officer), Gunn (the Warden),

and Wipf (the correctional counselor). On June 9, 1981, the jury brought in verdicts in favor of the plaintiff and against the remaining defendants Cranke and Seymour (the records officers). The jury declined to award punitive damages; it did, however, assess actual and compensatory damages in the sums of $640.00 against defendant Cranke and $1,450 against defendant Seymour.

After the verdicts were returned on June 9, 1981, the plaintiff made a motion for additiur, which was denied, as well as motions for attorney's fees and costs. The court, after soliciting both counsel's sugcestions as to the most efficacious way to proceed, directed the plaintiff to notice his motion for attorney's fees on the court's regular law and motion calendar and to submit a bill for his other costs in the manner prescribe by the local rules of this district.

On June 10, 1981, the Clerk of the Court, sua sponte, enter judgment in favor of plaintiff and against defendants Cranke and Seymour.

On June 15, 1981, the plaintiff filed a Notice of Appeal from Final Judgment (Ninth Circuit No. 81-4312). In this appeal, the plairtiff challenged various of Judge MacBride's rulings dismissing some of the plaintiff's original claims.

On June 17, 1981, the Clerk of the Court was reminded by counsel for the defendants that no judgment had been entered in favor of defendants Wipf, Gunn, and Spangler. The Clerk accordingly entered judgment on that date in favor of these aforementioned defendants and against the plaintiff. Neither this jud ment nor the June 10 judgment was entered pursuant to an order or this court.

On June 22, 1981, the defendants Cranke and Seymour noticed a motion for judgment notwithstanding the verdict pursuant to F.R.Civ.P. 50(b).

On July 24, 1981, the plaintiff, as directed by the court, noticed his motion for attorney's fees. On July 27, 1981, the plaintiff presented his (first) Bill of Costs.

At about this time it came to the court's attention that the Court Clerk's office had entered the June 10 and June 17 partial judments in this case. The court ascertained that the purported judgments were improper under F.R.Civ.P. 54, for, inter alia, they did not dispose of all the claims in the cases and, conversely, they did not meet the requirements of Rule 54(b) for final adjudication of fewer than all the claims in the. lawsuit. See Morrison-Knudson Co., Inc. v. Archer, 655 F.2d 962 (9th Cir.

1981). The court therefore determined on July 29, 1981, that the two purported judgments entered by the Clerk were "invalid and of no legal effect." In that same document the court ordered judgment to be entered against defendants Cranke and Seymour and in favor of the plaintiff, and judgment to be entered in favor of the other (14) defendants and against the plaintiff. This Order dated July 29, 1981, was the only time that this court ordered any entry of judgment in the present action.

On July 30, 1981, the Clerk of the Court attempted to enter judgment as directed by the court's order dated July 29, 1981. Unfortunately, the Clerk's Office made a clerical error and failed to include one of the sentences of the court's order.The Clerk subsequently corrected this error (apparently pursuant to F.R.Civ P. 60(a)), and issued an "Amended Judgment" on August 4, 1981.

On August 6, 1981, the plaintiff again noticed his appeal despite the fact that the defendants' motion for judgment notwithstanding the verdict was still pending in this court. (Ninth Circuit No. 81-4408). On August 14, 1981, the plaintiff filed an amended Notice of Appeal.

On about August 9, 1981, the plaintiff moved the Court o Appeals for an order compelling the defendants "to pay for their own record on appeal." (As the Court of Appeals explained, and as I shall reiterate below, this motion was apparently based on a misreading of both F.R.App.P. 10(b) and the Rules of the Unite States Court of Appeals for the Ninth Circuit).

On August 14, 1981, the plaintiff noticed a motion for a ne trial (as to damages only); the motion purported to rely on F.R.Civ.P. 59.

A motions panel of the Ninth Circuit Court of Appeals (hereinafter the "first motions panel") framed a sensible response to the assortment of untimely appeals and misconceived motions with which it was faced. On October 9, 1981, the Court of Appeals issued an order that (1) denied the plaintiff's motio to compel the defendants to pay for their own transcripts "without prejudice to the parties' right to present this controversy to the district court," (2) noted the possibility that the Court of Appeals lacked jurisdiction because the appeal was untimely filed, and instructed the parties to brief that issue, and (3) otherwise remanded the case to this court for the limite period of 42 days "to enable the district court to consider and rule on all pending postjudgment motions."

Nonetheless, a second order was issued by a second motions panel of the Circuit Court (hereinafter the "second motions panel") on Novmeber 10, 1981. In that order, the Court of Appeals announced that final judgment had been entered in the instant case on June 10, 1981, and that the appeal was "remanded to the district court with direction to vacate judgments entered on June 17, July 30, and August 4, 1981." The brief order did not explaineither the reasons for taking this action or its legal basis. The panel did state, however, that "[p]ursuant to the limited remand ordered by this court on October 9, 1981, the district court is vested with jurisdiction to rule upon all post judgment motions pending before it, including appellant's motion under Fed.R.App. P. 10(b) to compel appellees to pay for their own record on appeal."

Finally, on November 16, 1981, another order was issued extending the period of limited remand until November 30, 1981, so that this court would have sufficient time to evaluate the effect of the Court of Appeals' order dated November 10, 1981, and to obtain copies of the parties' briefs relating to the plaintiff's F.R.App.P. 10(b) motion.

II

THE CURRENT STATUS OF THE CASE

As the summary above suggests, there is a great and thoroughly unnecessary amount of confusion regarding the procedural posture of the instant action. This court had hoped to clarigy these matters in ruling upon the various motions and thus to spare the Court of Appeals the task. It now appears that the Court of Appeals will be forced to sort out the procedural details of this litigation. In an attempt to be of service to the Court of Appeals in this thankless

undertaking, this court respectfully offers the following comments regarding the status of the case at bar:

1. It would appear that the plaintiff's appeal (or appeals) from judgment in this case is (are) untimely and of absolutely no effect under F.R.App.P. 4(a)(4). That rule provide in pertinent part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judment under Rule 50(b) ... the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. (Emphasis added.)

In the instant case, the defendants have brought on a timely motion for judgment notwithstanding the verdict under F.R.Civ.P.

50(b)(see the discussion in Part III, below).Thus the notices of appeal filed by the plaintiff would seem to be without effect. The earliest that any party could appeal from the judgment - of the date of judgment -- would be today, November 30 1981, because it is only as of this date that the motion for judgment notwithstanding the verdict has been denied.

It would follow from this conclusion that the Court of Appeals never acquired jurisdiction over this litigation. In turn this would, of course, raise questions regarding the effect of the motion panels' determination on November 10, 1981, concerning the date of final judgment in the case.

Of course, it is for the Ninth Circuit Court of Appeals to determine its own jurisdiction; those questions cannot and should not be passed on by an inferior

court. Nonetheless, this court has been required to at least raise the issue in order to determine the limits of its own jurisdiction and the effect of the Circuit Court's various orders.

2. Presuming, as I do, that the second motions panel has decided that the appellant court had jurisdicition over the case, and meant to retain that jurisdiction even during the period of remand, I am still not confident that I apprehend the significance of the November 10, 1981, order. That order stated that "[t]he judgment entered on June 10, 1981, fully adjudicated the action as to all claims and parties remaining in controversy at that time and was therefore final. "At first blush this statement is difficult to reconcile with F.R.Civ.P. 54(b), which provides in part:

> When more than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the right and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the first place, the "judment" purportedly entered on June 10, 1981, was the sua sponte act of the Court Clerk; the act was not performed by order of this court nor was it done with this court's knowledge. "The mere entry of a notation by the clerk under Rule 58 does not create a judgment unless the court intended it to have that

effect. "Wright & Miller, Federal Practice and Procedure: Civil § 2651, p.11 (1973) (citing, inter alia, Steccone v. Morse-Starnett Products Co., 191 F.2d 197 (9th Cir. 1951)). This court can attest to the fact that it had no intention of entering a "final judment" in this action on June 10, 1981.

Second, the jugment entered by the Clerk of the Court only purported to resolve one claim against two defendants in a lawsu that, originally, involved several claims and sixteen defendants defendants.

Both the language of Rule 54(b), and the Ninth Circuit's recent decision in Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d 962 (9th Cir. 1981) teach that unless all the prerequisites of the rule are met, any purported adjudication "which adjudicates fewer than all the claims or the rights and liablities of fewer than all the parties

shall not terminate the action as to any of the claims or parties. . . ."

Once again, the Ninth Circuit is the authority on this issue. Of course, in accordance with the order of the second motions panel, this court will apply June 10, 1981, as the date of final judgment in this lawsuit. Nonetheless, the order leaves this court in a state of confusion: Has the panel, in some unspecified fashion, modified the holding that a judgment is not entered unless the trial judge so intends? Did the panel determine that the "judment" entered on June 10, 1981, actually -_ though silently -- adjudicated the rights and liabilities of all the parties defendant who were not mentioned therein? Does the panel mean to overrule the court's holding in the Morrison-Knuds case, or is that case to be distinguished from the instant lawsuit? The answer to these questions is urgent, not as an abstract

matter, but simply to assure that this court implements the law of the Circuit, not only in this case but in future cases as well.[1/]

3. As I shall explain, the order setting June 10 as the date of final judgment in this case does not seem to affect the disposition of the various postjudgment motions, with the possible exception of plaintiff's application for costs other than attorney's fees. The Court of Appeals' order makes it necessary nonetheless, to carefully evaluate the timeliness, as well as th substance of the various motions. Thus I shall address those motions seriatim, commencing with the defendants' motion for judgment notwithstanding the verdict.

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1. Since the Circuit's decision in Morrison-Knudson this court has directed the Clerk not to enter separate judments unless specfically directed to do so by the court. In light of the second panel's order I am uncertain whether this court instructed the Clerk properly.

III

THE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The substantive issues raised by defendants Cranke and Seymour in this motion are addressed in the companion published opinion; I conclude in that opinion that the motion lacks merit and must be denied. A discussion of the timeliness of this motion is not an empty exercise, however. As I have noted, a timely motion under F.R.Civ.P. 50(b) precludes either party from appealing the judgment in the lawsuit. Since this motion was brought pursuant to Rule 50(b), its timeliness or lack thereof has significant complications for the appeals taken by the plaintiff.

The jury returned its verdicts against defendants Cranke and Seymour, and was discharged on June 9, 1981. The Ninth Circuit has instructed this court that the

the date final judgment in the case is June 10, 1981. The defendants brought on their motion for judgment notwithstanding the verdict on June 22, 1981. The plaintiff contends that this motion is untimely for it was not brought within 10 days after the date on which the jury was dismissed.

Under Federal Rule of Civil Procedure 50(b), a motion for judgment notwithstanding the verdict must be brought on "[n]ot later than 10 days after entry of judgment...." The date of the jury's discharge is only relevant to this computation if no verdict was rendered in the lawsuit. Wright & Miller, Federal Prac tice and Procedure: § 2537 at p.601 (1971). The vital inquiry, therefore, is whether defendants made their motion within 10 day after June 10, 1981.

To make this determination we must turn to the rules for computing time as set

forth in F.R.Civ.P. 6(a). The applicable provisions of that rule are stated as follows:

> In computing any period of time prescribed or allowed by these rules . . . the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Once again, the time alloted defendants for bringing on their motion was 10 days from the day judgment was entered. That day - June 10, 1981 -- is not included in the designated period . The tenth day of the period, then, is June 20, 1981; that date, however, fell on a Saturday. Thus, the last day on which the defendants could file their motion for judgment notwithstanding the verdict under Rule 50(b) was the following Monday, June 22, 1981. That was in fact the

day on which the defendants filed their motion; thus the motion was timely made and could be considered on its merits by this court. See Jones & Laughlin Steel Corp. v. Gridiron Steel Co., 382 U.S. 32 (1965). By the same token, the plaintiff's appeal (or appeals) were noticed at a time not permitted under F.R.App.P. 4(a)(4), and should have no effect. (See discussion in Part II, above.)

IV

PLAINTIFF'S MOTION FOR A NEW TRIAL

The jury found defendants Cranke and Seymour liable to the plaintiff; in doing so it necessarily concluded that the said defendants were responsible, at least in part, for the final 16 to 17 months of the plaintiff's unlawful imprisonment. The total damages awarded by the jury, however, amounted to only $2,090.00. Thus the plaintiff has moved this court, in light of

the low figure awarded, to order a new trial solely on the issue of damages.

As matters stand, the motion is definitely untimely. The motion is based on F.R.Civ.P. 59; section (b) of that rule states that "[a] motion for a new trial shall be served not later than 10 days after the entry of judgment." As F.R.Civ.P. 6(b) makes clear, the court has virtually no discretion to extend or enlarge this 10-day period. 2 Moore's Federal Practice ¶6.07[1] (1981 ed.); Wright & Miller, Federal Practice and Procedure § 1167 (1969). In the instant case the date of final judgment has been fixed as June 10, 1981; the plaintiff, however, did not bring on his motion until August 14, 1981, more than 60 days later. The court, therefore, is not empowered to consider the substance of the motion.

Even if the Court of Appeals did not set June 10, 1981, as the date of final

judgment, however, the plaintiff's motion would be denied. First of all, the defendants present a persuasive argument to the effect that the motion was untimely made made in any case. Judgment was entered by order of the court on July 30, 1981; the plaintiff brought on his motion more than 10 days after the entry of that judgment as well. The plaintiff however, contends that the date of final judgment is the case is August 4, 1981, that is, the date on which the Clerk of the Court entered an Amended Judgment to correct a clerical error. In response, the defendants argue that F.R.Civ.P. 60(a), which empowers the court to correct clerical errors at any time, is a housekeeping provision that in no way impairs the finality of judgments. 6A Moore's Federal Practice ¶60.03[1] (1979 ed.). Thus, the defendants argue, the statutory 10 day

period could no have been enlarged by the Clerk's amendment of the the judgment.

Without pausing to decide this hypothetical timeliness problem, I will observe that the plaintiff's motion would almost certainly fail on the merits. There is ample precedent for granting a new trial limited to the question of damages. Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968), cert. denied, 397 U.S. 1036 (1970); Brown v. Richard H. Wacholz, Inc., 467 F.2d 18 (10th Cir. 1972); 6A Moore's Federal Practice ¶¶59.06, 59.08[6] (1979 ed.). As Wright and Miller noted, however, '[t]he court is not free to set aside the verdict merely because the judge might have awarded a different amount of damages, but it may do so if the proceedings have been tainted by appeals to prejudice or if the verdict, in the light of the evidence, is so unreasonable that it would be unconscionable

to permit it to stand." Wright and Miller, Federal Practice and Procedure § 2807 at pp. 51-52 (footnotes omitted); See also Southern Pacific Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951), cert.denied 341 U.S. 904 (1951).

I have no doubt that I would have awarded more in damages than did the jury. What the court would have done, had it been the trier of fact, is not the issue, however. I cannot say that the verdict rendered as to damages is unconscionable in light of the evidence presented.

The jury had the unenviable task of unenviable task of quantifying the damage that 16-17 months of unlawful confinement caused to a man who ha been lawfully confined for decades. Neither the law nor the arguments of counsel provided much of a compass for the jury to chart their course. True, plaintiff's counsel did prove that the plaintiff had been kept in prison after his

term ended; counsel also presented evidence displaying the wretched quality of life in prison. Counsel did not, though, provide the jury with any solid means of translating the deprivation suffered by the plaintiff into a dollar figure, nor was evidence presented as to actual damages suffered by the plaintiff. In short counsel did not present any economic evidence to the jury. The exception, perhaps, was closing his speech, in which he said;

> If you take the average citizen he earns about $15,000 a year; divided by 365 days it only comes out to about $4.00 a day [sic]. Now we all know that is a ridiculous figure as far as one day of freedom is concerned. A day of freedom is measured by a different standard.

Regretably, counsel never expicated that "different standard." The jury may well have based its award on the only solid figure provided by the plaintiff: the damages it awarded approximated $4.00 per day for every

day of unlawful imprisonment for which the defendants could be held responsible.I ccnclude that the jury's award was not a shocking, nor even a thoughtless response to the evidence presented.

V

PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

At the close of trial, the plaintiff moved for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). Section 1988 provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] ... 1983 ... of this title, ... the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

The defendants raise an array of objections to the attorney's fee request. The significant of those objections are that (1) plaintiff's application for attorney's fees was untimely; (2) the plaintiff is not

entitled to attorney's fees under the statute; and (3) even if the application was timely, and attorney's fees are in order, the plaintiff's request is grossly excessive. As I shall explain, the instant application should not be barred for untimeliness, and this is an appropriate case for awarding attorney's fees. There is merit, however, to many of defendants' exceptions to the amount of fees requested by the plaintiff. Thus the court will award attorney's fees to the plaintiff, but a substantially lower amount than he requested. Before turning to the more weighty issues raised by the defendants, however, I will address one of their subsidiary claims.

A. Defendants' Request for an Evidentiary Hearing

The defendants insist that they are entitled to an evidentiary hearing on the amount of fees to be awarded to plaintiff.

The short answer is that, in this Circuit, there is no such "right" to an evidentiary hearing on this matter. Manhart v. City of Los Angeles, Dept. of Water & Power, ___F.2d___, No. 79-3225, Slip op. at 3894 (9th Cir. August 7, 1981); Williams v. Alioto, 625 F.2d 845, 849 (9th Cir. 1980). Nor do I think that an evidentiary hearing is necessary in this particular case. This court is well enough acquainted both with the details of this case and with the norms of the legal profession to evaluate the claims made by the plaintiff and the exceptions raised by the defendants. While there can hardly be too much data in this sort of situation I am confident that I have been presented with sufficient information to decide the matter before me. Finally, the defendants argued that "[t]here is no rush for a final judgment on the fee application." Since that argument was made, however, the

Court of Appeals has imposed a very definite limit on the amount of time this court can devote to considering the matter. This time limit simply did not allow for the kind of hearing demanded by the defendants.

B. The Timeliness of Plaintiff's Application

On June 9, 1981, at the close of trial, the plaintiff orally moved for attorney's fees. At the request of defendants' counsel, the court instructed the plaintiff to bring on a motion on the court's regular law and motion calendar. The plaintiff noticed said motion on July 24, 1981, and argument was heard on the motion on August 31, 1981.

The defendants contend that the motion was untimely because it was noticed more than 10 days after the date of final judgment in the case. The defendants start from the premise that, under 42 U.S. C.

§ 1988, attorney's fees are considered "costs;" thus application for such fees must be made in the manner provided for in the relevant local rule of court. In this regard, the defendants rely on Obin v. Dist. No. 9, Int'l Assoc. of Machinists, 651 F.2d 574 (8th Cir. 1981). Local Rule 122 provides in pertinent part:

> Within 10 days after notice of entry of a judgment under which costs may be claimed, the prevailing party may serve on the adverse party and file a motion to tax costs.

Under the second motion panel's order the entry of judgment in this action was on June 10, 1981; the plaintiff did not notice his motion until July 24. Thus the defendants argue that the motion was noticed too late, and is untimely, and that the application must be denied.

The answer, of course, is that the motion was made, in court, on June 9, 1981,

and was in no sense too late to be considered. The defendants respond, in effect, that if that is the case the motion was made too early, for the local rule requires the motion for local rule requires the motion to be filed "after notice of entry of ... judgment." For several reasons, this hypertechnical attempt to defeat the plaintiff's motion must fail.

First of all, it is by no means clear that a motion for attorney's fees must always be made in the manner prescribed for presentation of a bill of costs. According to the only authority in this Circuit cited by the defendants: "Under Fed.R. App.P. 39(d), a bill of costs must be filed within -14 days of entry of judgment. Though attorneys' fees may be awarded as part of a bill of costs, they may be requested separately and need not be requested within the 14-day period, at least in the Ninth

Circuit." Suzuki v. Yuen, 507 F.Supp. 819, 823 n.5 (D.Hawaii 1981 (Emphasis added).[2/]

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2. Here, of course, the Suzuki court was discussing appellate procedure. It is nonetheless hard to reconcile this quote with the earlier passage relied on by the defendants, in which the court says: "Plaintiffs therefore moved for award of attorneys' fees within the ten-day period after final judgement required under Fed.R.Civ.P. 59(e). See White v. New Hampshire, 629 F.2d 697 (1st Cir. 1980) . . . ." Suzuki v. Yuen, 507 F.Supp. 819, 821 n. 2 (D. Haw. 1981). The White case, as the citation suggests, holds that attorney's fees are not costs, but rather are part of general run of controverted issues resolved within the contours of a court's final judgment.'' 629 F.2d at 703. Thus, the court in White required that all motions for attorney's fees be noticed within ten days of entry of judgment if not sooner. The rule in White is not the law of this circuit; most circuits that have considered the question have rejected that rule. Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981); Johnson v. Snyder, 639 F.2d 316 (6th Cir. 1981); Jones v. Dealers Tractor and Equipment Co., 63 F.2d 180 (5th Cir. 1981); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980). Nor Nor is it clear from the language in Suzuki v. Yuen whether the court was adopting the White rule or merely making an observation. Nonetheless I note that the plaintiff's motion for attorney's fees would be timely, for it was made before final judgment was entered, and any delay is attributable to reasonable reliance on this court's directions.

Second, I do not conclude that the plaintiff violated Local Rule 122. The better view, and the one to which this court subscribes, is that the court is bound to adhere to its own rules. See, Wright & Miller, Federal Practice and Procedure § 3153, p. 224 (1973). The corollary, however, is that "the court that adopted the local rule is the best judge of its meaning." Id. at 225. It is apparent, using standard rules of construction, that Local Rule 122 is directory, rather than mandatory in character, and does not set out the exclusive manner in which a party can apply for costs.It states that a party "mav." file a motion in the time and manner provided; if the party complies he or she may not be challenged for filing untimely. Dickinson Supply, Inc. v. Montana-Dakota Utilities Co., 423 F.2d 106, 110 (8th Cir. 1970). Rule 122 does not purport to, nor should it be

read to preclude the parties from making application in an alternative manner whic accords with the purpose of the rule. The purpose of the rule, obviously, is to bring litigation to a prompt and orderly close; while this purpose may be defeated by a motion brought on too late, such is not the case when a motion is brought on "early," and is disposed of in a manner determined by the court and agreed to by the parties.

Third, unlike other, simil.ar local rules, Rule 122 does not provide that costs not timely claimed are "waived. "See, e.g., Dickinson Supply Inc. v. Montana-Dakota Utilities Co., 423 F.2d at 110.The only sanctions for noncompliance with Rule 122 are found in Local Rule 5, which allows the court discretion to appl such sanctions as are "authorized by statute or rule...."Thus, even if the plaintiff was required to comply with

Local Rule 122 and failed to do so, he still is not automatically precluded from recovering attorney's fees. That is a matter within the discretion of this court, and this court is not inclined to exercise exercise its discretion on the manner suggested by the defendants. If the plaintiff did bring on his motion untimely, he did so at the behest of the court. It would be patently unfair for the court to so severely penalize the plaintiff for doing what i told him to do. Thus even in situations where the time limits for making a motion are clear, and the trial court has no authority to extend those limits (e.g. a motion for new trial under F.R.Civ.P. 59), the courts have treated untimely motions as timely brought when the tardiness of the motion was caused by the trial court.See, Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964); 6A Mooore's Federal Practice ¶ 59.09 [3] at

213-215. The Ninth Circuit has held that an untimely bill of costs must be considered by the court if the untimeliness was caused by reasonable reliance on a statement made by the Clerk of the Court.Research Ecuity Fund, Inc. v. Insurance Co. of North America, 597 F.2d 1266 (9th Cir. 1979).It follows, a fortiori, that a court must consider costs that are filed in the manner directed by that court, whether timely or not. Finally, and most critically, the defendants can show no prejudice from the court's entertaining the "premature" motion.

I conclude, therefore, that the plaintiff's motion for attorney's fees was timely made and must at any rate be con sidered by this court.

C. The Appropriateness of Attorney's Fees

The defendants next make a series of arguments all to the effect that this is not

an appropriate case for awarding attorney's fees under 42 U.S.C. § 1988.I do not find these arguments persuasive.

First, defendants contend that plaintiff is not entitled to attorney's fees "since the instant case was essentially a tort action for money damages," and is not the sort of litio-atio that 42 U.S.C. § 1988 was designed to encourage. The extended discussion of plaintiff's case that is found in the accompanying published opinion should make at least one point quite clear: this lawsuit is not simply a tort action for false imprisonment or negligence. The plaintiff alleged and proved that the defen dants caused him to be deprived of rights guaranteed by the fourteenth amendment; the issues involved are far more complex and significant than those posed by a simple tort action.

Similarly, the claim that "plaintiff's action conferred no great benefit on society nor did it establish a precedent which would affect large numbers of people" misses the park. To begin with, we have the testimony offered by the defendants' witness to the effect that no other records officers would have done more than the defendants did to investigate the plaintiff's meritorious claim that he was entitled to be released. One hopes that this lawsuit will have some impact on the standard of conduct of officials who are charged with releasing prisoners whose sentences have run. Furthermore, the issues raised in this litigation were sufficiently fresh and important that this court thinks it worthwhile to publish its conclusions. Whether that precedent will "affect large numbers of people" renains to be seen.

The defendants' reliance on Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979) is misplaced. In Buxton, the Ninth Circuit held that a District jud-oe did not abuse his discretion when he refused to award attorney's fees. The Court noted that, in that case, the plaintiffs had no difficulty attracting "competent counsel who were undeterred by the prospect of having to look to the [plaintiffs] for payment of their fees. Moreover . . . adequate compensation to counsel was provided from the recovery. 595 F.2d at 1185. In the instant case, it cannot be said that a man who has spent decades of his life in prison is the sort of "sympathetic plaintiff" who would easily attract counsel willing to work on a contingent fee basis. It was quite likely that, would not even if he did prevail, the damages awarded would not provide adequate compensation to counsel; clearly they did

not. Most important, the court emphasized in Buxton that it was deferring to the broad discretion of the trial judge. In a more recent case, much closer on both facts and law to the instant action, the Ninth Circuit affirmed the trial court's discretion to award damages to a man who had been unlawfully incarcerated. Smiddy v. Varney, ___F.2d___, Nos. 79-3078, 79-3480, Slip op. at 3837 (9th Cir. August 7, 1981). Thus this court must exercise its discretion, relying on earlier cases not for their results but for the principles they articulate.

As the Ninth Circuit has made clear, the star which must guide this court in exercising its discretion is the purpose underlying 42 U.S.C. § 1988. "... Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Award Act

must be liberally construed to achieve these ends. 'In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.'" Dennis v. Chang, 611 F.2d 1302 1306 (9th Cir. 1980) (quoting S.Rep.No. 94-1011, 94th Congress, 2d Sess., 3 reprinted in [1976] U.S. Code Cong. & Ad.News 5910. The approach suggested by defendants could effectively preclude former prisoners and other "unsympathetic plaintiffs" from litigating constitutional claims, for attorneys could not risk the necessary months and years of work on what could turn out to be an insignificant damages verdict. This result cannot be squared with the broad remedial purposes of the statute. The statute is not designed to reward attorneys for winning high verdicts; it is meant to encourage them to sue on meritorious constitutional claims.

The defendants' other arguments in this regard can be dispatched rather more quickly. They contend that the small amount of damages awarded by the jury was no more than "nominal damages and that the plaintiff is not, therefore, a "prevailing party" within the meaning of 42 U.S.C. § 1988. The defendants cite no case authority for the novel proposition that a plaintiff has not prevailed unless he has won a large damages award. In fact, it is well established in this Circuit that "[p]laintiffs should be considered prevailing parties so long as they prevail on 'a significant issue in litigation which achieve[d] ... the benefit which the parties sought in bringing suit. '"Manhart v. City of Los Angeles, Dept, of Water & Power, supra at 3893 quoting Williams v. Alioto, 625 F.2d 845, 847 (9th Cir. 1980) cert. deni U.S., 101 S.Ct. 1123 (1981), quoting Sethy v. Alameda County Water

District, 602 F.2d 894, 897-98 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980). See also Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). There is no doubt that the plaintiff did prevail on the central issue in this lawsuit he proved that he had been deprived of his constitutional rights, and that the defendants had caused that deprivation. The defendants may not now parlay a favorable result (from their standpoint) as to damages into a ruling that they were the "prevailing parties" in the lawsuit.That the damages awarded were modest, and that the plaintiff's counsel may have been in part responsible for that result, is something that will be considered in calculating the amount of attorney's fees awarded. The low damages figure, however, does not in itself require the court to deny the applic tion for fees entirely.

D. The Amount of Fees to be Awarded

Plaintiff prays the court to provide fees for his attorney's services in the amount of $57,731.25. In addition, plaintiff requests $18,187.50 in paralegal fees: thus he requests a total of $75,918.75. Because the paralegal fees are presumably a fixed cost, as opposed to payment for professional services; and because different considerations go into calculating those fees, I shall address the question of appropriate paralegal fees separately.

First, however, I shall turn to the calculation of the attorney's fees per se. As I shall explain, the sum requested by the plaintiff is entirely too high and, accordingly, must be reduced. The Ninth Circuit has instructed this court as to the twelve relevant factors that must be considered in determining the amount of

attorney's fees to be awarded. Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied su nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976); See Johnson v. Georc.ia Highway Express, 488 F.2d 714 (5th Cir. 1974). By applying these factors to the case at bar, I shall analyze the claim and arrive at an appropriate figure.

1. Time and Labor Required

Plaintiff's counsel states that, between 1975 and the present, he devoted a total of 728.75 hours of professional services to the instant lawsuit. He asks recompense at the rate of $75.00 per hour for work done outside of court (643.75 hours) and $100.00 per hour for court time (104.75 hours). In addition he requests $50.00 per day for travel and per diem living expenses for the total of 21 days spent away from his

offices in Santa Cruz, California. The defendants make a number of objections to this calculation.

On the whole, the hours of work claimed by plaintiff's counsel appear to be fair and reasonable. The defendants object to particular entries in plaintiff's counsel's detailed, yearby-year breakdown. I have carefully reviewed these entries and conclude that the time spent by counsel on the specific motions, items of discovery, etc., was not unreasonable. The few irreconcilable entries noted by the defendants are readily explicable as the result of clerical errors.

At least one objection raised by the defendants has merit, however. As they point out, plaintiff's counsel "rounded off" all time spent on the case to the next highest quarter of an hour. Thus, if counsel (or the paralegal) spent 12 minutes on some

matter involved in the case, he entered .25 hours in his records; if he spent 22 minutes he entered .50, etc. This system, of course, always accrues time to the benefit of the person making the entry. Plaintiff's counsel responds that such rounding off is not an unconventional method of record keeping in private practice and indeed it is not. The favored method, however, is for the attorney to record his time by dividing the hour into 10, rather than 4 parts; this system is far more equitable for the client. A commercial client, dissatisfied with counsel's method of keeping records, retains the option of going elsewhere. The court, in calculating fees post hoc, does not enjoy that option.I conclude, therefore, that the number or hours claimed by counsel should be reduced by a factor of 10% to compensate for the inflation due to his method of keeping records.

Finally, I note the arguments tendered by the defendants to the effect that counsel should only be awarded fees for those claims on which he prevailed. Because, as I explained in Part I, supra, the plaintiff prevailed on only a small portion of his original complaint, this would mean a radical reduction in the number of hours for which counsel could receive fees. In two recent cases, decided on the same day, the Ninth Circuit specifically disapproved the approach advanced by the defendants In Manhart v. City of Los Angeles, Dept. of Water & Power, .F , No. 79-3225, slip op. at 3895-96 (9th Cir. August 7, 1981), the Court resolved the issue thusly:

> The award cannot be deemed excessive because it included fees for time spent in preparing those claims dismissed by the district court. It is true that no compensation may be paid for the time spent to prepare unrelated claims on which plaintif-s did not prevail. [] In this case, however,

> plaintiffs pursued several claims to remedy the same injury, gender discrimination. Under those circumstances, plaintiffs are entitled to an award for all time spent in pursuit of their ultimate goal.

And, in Smiddy v. Varney, ___ F.2d ____, Nos. 79-3078, 79-3480, Slip Op. at 3837 (9th Cir. August 7, 1981), the Court upheld an award of total attorney's fees in a case in which claims were dismissed against several of the defendants. In the instant case, all of the claims were pursued by the plaintiff to remedy the same constitutional injury: the unlawful confinement in derrogation of his rights under the fourteenth amendment. Thus the fact that some claims were dismissed does not provide a basis for reducing the number of compensable hours or the amount of fees awarded.

2. The Novelty and Difficulty of the Legal Questions Involved.

The defendants contend that the novelty and difficulty of the questions

involved in this case do not warrant an upward adjustment of the figure presented by plaintiff's counsel. I disagree. As I discuss in detail in the companion opinion, this case involved novel and extremely complex issues regarding the nature of the statute under which it was brought (42 U.S.C. § 19 and the state of mind requirements (if any) implied into the plaintiff's cause of action by the underlving constitutional claims. In addition, the case involved complicated issues regarding the immunities from suit claimed by the various defendants. In several respects, this case presented issues that are at the frontier of civil rights litigation. On this basis, I would increase the award to plaintiff's counsel. As I shall explain, however, this increase is more than offset by the reduction for the results obtained by counsel.

3. The Skill Requisite to Perform the Legal Services Properly.

Both because of the difficult legal issues involved, and because of the troublesome question of the damages involved, the case required a high level of skill if it was to be handled properly. I cannot say, however, that plaintiff's counsel consistently displayed that highest level of requisite skill. Although his briefing and other "paper" work was generally adequate, his presentation to the jury was not at the same level. Even if the out-of-trial effort generally justifies an award at the high level sought, I believe a reduction is justified overall. Moreover, I do not believe that counsel's trial performance justifies the higher hourly figure he claims for court time. Hence, all his work will be figured at the same rate, regardless of whether it was spent in or out of court.

4. Preclusion of Other Employment Due to Acceptance of the Case.

I do not think this a particularly significant factor in the present case.I do note counsel's dedication to this case.

5. The Customary Fee

Counsel sets his fee at $75.00 for time spent on the case generally, and $100.0 for time spent in court. These figures are not in themselves unreasonable. Nonetheless for the reasons previously stated, all time spent on the case will be figured at the sam base rate of $75.00 per hour.

I note that $75.00 per hour would have been a very high attorney fee in 1975.However, the fee is being paid in 1981 rather than in 1975 when the services were rendered. Due to the general inflationary trend in our society, paying counsel today i 1975 dollars would simply not compensate him. There are two avenues available to the court

in this regard. First, I could calculate the appropriate fee based in part upon a reasonable rat in 1975 and then add an inflation factor. See Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., Inc., 406 F.Supp. 828, 834-35 (N.D. Cal. 1976); Parker v. Califano, 443 F. Supp. 789, 793 (D.D.C. 1978). Alternatively, I could simply award fees based upon a currently reasonable rate. See Manhart v. City of Los Angeles, Dept. of Water & Power, supra, slip op. at 3894-95. The two methods of calculation are equally just and fair. Therefore, because the latter is more direct, I decline to follow defendants' suggestion that I calculate counsel's compensation on a year-by-year basis.

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6. The Contingent Nature of the Fee

Counsel states rhat hetook this case on a contingent fee basis and did so primarily because the case was interesting and because he thought an injustice had been done the plaintiff. Frankly, I give credence to these assertions. As I have explained, due to the nature of the injury and the plaintiff's record, there was a significant possiblity that the damages ultimately awarded would provide little compensation either for the plaintiff or his counsel. Under the circumstances, however, my view is that the contingent fee arrangement is not significant in either direction.[3/]

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3. In this regard I note the fact, presented by both sides, that the contingent fee arrangement between plaintiff and his attorney extends to the attorney's fees awarded as well. Having noted the fact, I shall disregard it, for I do not think it a proper consideration for this court.

7. Time Limitations Imposed

This factor is not relevant to the instant case for there is no indication that either the client or the circumstances im posed any applicable time limitations on counsel.

8. The Amount Involved and the Results Obtained.

This factor is of great significance in the instant case. While the plaintiff did prevail on the issue of liability, the damages he was awarded -- $2,090.00 -- are minute in comparison with the fees prayed for by his attorney. I have noted that the jury may have been unwilling to award substantial damages in this case in any event. I have also noted, however, that counsel's minimal (and inaccurate) presentation on the issue of damages may have been part of the reason that the verdict awarded to plaintiff was so low. Thus this factor commends a drastic reduction

in the amount of fees awarded to plaintiff's counsel.

9. The Experience, Reputation and Ability of the Attorney.

According to his resume, counsel is a moderately experienced attorney with a strong background in public interest and civil rights law and litigation. I know not of his reputation. His abilities have already been discussed.

10. The "Undesirability" of the Case

This factor, too, has been discussed.Suffice it to say that the case was a difficult and demanding one, and that the plaintiff's background made it less than desirable for an attorney with an eye fixed on "the bottom line." On the other hand, there was no question that the plaintiff haa suffereda grave deprivation, and an experienced attorney may have been sanguine about obtaining a more favorable result. On

the whole, this factor supports a substantial award of attorney's fees.

11. The Nature and the Length of the Professional Relationship.

Neither party has suggested that this factor is relevant to the amount of fees in the instant case.I note, however, that there does not appear to be much possibility that plaintiff's counsel received other significant, fee-generating work from the plaintiff in consideration for having represented plaintiff in the present lawsuit.

12. Awards in Similar Cases

The parties did not favor the court with any information in this regard.

CONCLUSION

Counsel for the plaintiff avers that he has spent a total of 728.75 hours working on the instant lawsuit. This figure properly includes time spent litigating the issue of fees itself Manhart v. City of Los Angeles,

Dept. of Water & Power, supra, slip op. at 3896; Williams v. Alioto, 625 F.2d at 850. Because ofcounsel;s method of keeping records, I reduce that figure by 10%, to a net of 655.875 compensable hours.

Counsel requests payment at the rate of $75.00 per hour for time spent on the case outside of court, and S100.00 per hour for time spent in court. For the reasons stated, I will calculat all of his compensable hours at the basic $75.00 rate.

The resulting base (or "lodestar") figure is $49,190.25. The novelty and difficulty of the issues involved, the protractec nature of the litigation, and the relative undesirability of the case would, in themselves, lead me to add approximately 35% onto the lodestar figure. See Manhart v. City. of Los Angeles, Dept. of Water & Power, supra.

The skill displayed by counsel and, most importantly, the amount and the result obtained by counsel would, in themselves, lead me to reduce the lodestar figure by 65%. See Smiddy v. Varney, supra.

Based on all the factors considered, and in view of the broad remedial purposes of the Attorney's Fees Awards Act, I reduce counsel's lodestar figure by 30%.

Thus the fees awarded to plaintiff's counsel, as attorney for the prevailing party in this litigation, are set at $34,433.17.

To this sum I add 21 days of travel and per diem living expenses claimed by counsel at the reasonable rate of $50.00 per day, or a total of $1,050.00. Thus the fees and personal expenses awarded to plaintiff's counsel total $35,483.17. This leaves only the amount of paralegal fees to be calculated.

E. The Amount of Paralegal Fees

Plaintiff claims that Phillip Gaskill, the paralegal working on this case, devoted 689.5 hours to the instant lawsuit plaintiff requests compensation for Mr. Gaskill's services at th rate of $25.00 per hour. In addition, plaintiff requests a travel and per diem allowance of $50.00 per day for the 20 days that Mr. Gaskill traveled from Santa Cruz, California to the federal courthouse in Sacramento, California.

Fee awards for services rendered by paralegals and law clerk have consistently been approved by the Ninth Circuit. Manhart v. City of Los Angeles, Dept. of Water & Power, supra, slip op. at 3894 n.2; Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc. 526 F.2d 1196, 1210 n.19 (9th Cir. 1975), cert. denied 425 U.S. 959 (1976). Moreover, the rate requested by plaintiff -- $25.00 per hour -- was used as

a base rate in Manhart as well, and the court's experience confirms that the figure is not an unreasonable one. One judge has cautioned that "[a]ny element of profit must ... be excluded from the [paralegal fees] award," Chapman v. Pacific Telephone & Telegraph Co., 456 F.Supp 77, 83 (N.D. Ca.l.. 1978). In this case, however, there is no indication that the paralegal fees requested represent any element of profit for the plaintiff or his attorney. By that same token, it would make little sense to include the cost of paralega fees in the attorney's "lodestar" figure when adjusting that figure according to the factors reviewed above.

The hours claimed, however, are more problematic. First of all, the defendants point out that the hours claimed for the paralegal's work are mirrored exactly by the hours that the attorney claims to have worked on the same task. Thus, defendants claim,

the paralegal's services are merely duplicative and should be disallowed. It is far from uncommon, though, for attorneys and paralegals to work in tandem on projects such as those listed by the plaintiff. It would be far more surprising if, for instance the paralegal was given sole credit - or drafting a complaint or responding to interrogatories. I conclude that the defendants' accusations of waste and duplication are greatly exaggerated. They are not groundless, however; my review of the hours reported by the attorney and the paralegal leads me to believe that some of their parallel efforts were in fact duplicative, or at least excessive. On that basis, I reduce the number of compensable paralegal hours by 10%.

Second, I note that among the hours claimed for Mr. Gaskill is time spent in court, or traveling to and from the courthouse. If professional services were

rendered at those times, however, they must have been rendered by plaintiff's attorney; while it may be convenient to have a paralegal in court, I cannot see any way in which it was necessary. For this reason, I disallow all court and travel time claimed for Mr. Gaskill, as well as the per diem and travel allowances.

Finally, I note that the infirmity in the attorney's method of keeping records applies with equal force to the records kept of the paralegal's work time. I thus discount the hours claimed for Mr. Gaskill by an additional 10%.

CONCLUSION

Plaintiff requests compensation for 689.5 hours of paralegal services.I disallow 194..5 of those hours which were spent either in court, traveling to and from court, or taking depostions. What remains is 495 compensable hours; from this remainder I

deduct 10% for apparent duplication of efforts, and 10% to set off plaintiff's counsel's overly generous record keeping. This leaves a net of 396 compensable hours; multiplied by the hourly rate of $25.00 I arrive at a total of $9,900.00 in paralegal fees.

TOTAL

The court hereby awards plaintiff the amount of $45,383.17 as attorney and paralegal fees.

VI

PLAINTIFF'S MOTION FOR COSTS

Plaintiff has presented a bill for costs, other than attorney's fees, in the sum of $996.14.I note that the bulk of the taxable costs claimed by the plaintiff is comprised of a claim for $591.51 in fees for an expert witness who was never called to testify. This hardly sees to meet the requirement that "[t.lo be taxable as costs

the witnesses' testimony must be material to an issue tried and reasonably necessary to its disposition. "United California Bank v. THC Financial Corp., 557 F.2d 1351, 1361(9th Cir. 1977).I do not reach the appropriateness of the costs claimed, however, because I conclude that the plaintiff's bill of costs was filed untimely.

Like his motion for attorney's fees, plaintiff's motion for costs was made orally at the close of trial. Unlike the motion for attorney's fees, however, the motion for costs was not supposed to be noticed and heard on the court's regular law and motion calendar.Instead the court directed plaintiff to file his cost bill "in the ordinary way, as provided by the Local Rules. As I have explained, Local Rule 122 clearly provides for a time and a method for filing costs. Specificially, the rule states the prevailing party may serve and file a motion

for costs withi 10 days after notice of entry of judgment. In this case, entry of judgment was noticed on June 10, 1981; the plaintiff did not file his bill of costs until July 27, some six weeks later.

The reasons why the motion for attorney's fees was not untimely are of no aid to the plaintiff in this context. Although, as I stated, Local Rule 122 is not a mandatory. rule, its provisions became mandatory when the court directed plaintiff's counsel to file his bill of costs in compliance with that rule. Moreover, the plaintiff's failure to timely file was not the resu.lt of a reasonable reliance either on the court itself or on the Clerk of the Court. See Research Equity Fund, Inc. v. Insurance Company of North America, 597 F.2d 1.266, 1267 (9th Cir. 1979). On the contrary, the plaintiff obviosuly believed that June 10, 1981, was the date of final

judgment, for he noticed his appeal but five days later. Even if the plaintiff was misled by the Clerk's subsequent notice of entry of judgment not have filed his bill of costs by June 27 instead of July 27, 1981. Indeed, the only reason why the plaintiff's costs were untimely is that the plaintiff's counsel failed to attend to the necessary details.

Finally, in discussing the timeliness of the attorney's fees motion, I noted that Rule 122 does not automatically disallow costbills that are untimely filed; rather the sanctions to be taken are left to the discretion of the court by Local Rule 5. I noted there that I was not inclined to disal-.low the motion for attorney's fees, for I felt that the objections raised to the timeliness of that motion were mere formalisms, and erroneous ones at that. In this context, however, I am inclined to refuse the plaintiff's application for costs,

for there was simply no excuse for the extreme tardiness in the filing. The plaintiff's application for costs is denied. See United California Bank v. THC Financial Corp., 557 F.2d at 1361; Baldwin v. Redwood City, 540 F.2d 1360, 1375 n.43 (9th Cir. 1976).

VII

PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO PAY FOR THEIR OWN TRANSCRIPT ON APPEAL

The plaintiff brought on a motion before the Court of Appeals, requesting that court to order the defendants to pay for their own transcript on appeal. In its order dated October 1981, the Court of Appeals denied that motion "without prejudice to the parties' right to present this controversy to the distric court." In its order dated Novmeber 10, 1981, the Court of Appeals emphasized that this court is currently vested with jurisdiction to rule on the

instant motion. As I shall explain, I do not think that any mcoion regarding transcripts on appeal is Poroperly before either this court or the Court of Appeals.

I can do little more than reiterate what the Ninth Circuit held in its order of October 9, 1981. Ninth Circuit Rule of Court 4(c) provides that "[i]n civil appeals, the reporter's transcript shall be designated as provided by Rule 10(b) of the Federal Rules of Appellate Procedure."According to Fed.R.App.P. 10(b),

> (1) Within 10 days after filing the notice of appeal the appellant shall order from thereporter a transcript of such parts of the proceedings ... as he deems necessary .... (3) Unless the entire transcript is to be included, the appellant shall, within the 10 days provided ... file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy ... of the statement. If the appellee deems a transcript of other parts of the proceeding to be necessary, he shall, within 10 days after the service of the ... statement of the

> appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appel lant to do so. (4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

Put in simple terms, plaintiff was required to serve on the defendants a statment of the issues he intended to raise on appeal within 10 days of filing the appeal. Apparently the plaintiff failed to do this in a timely manner. If the defendants wished the plaintiff to order additional part of the transcript, they could designate which portions they wanted the plaintiff to order. Apparently the defendants did this, although it is not clear whether they acted in a timely manner. If the plaintiff failed to

order the transcripts designated by the defendants -- and the plaintiff failed to do so -- the defendants had two options. First, they could order the transcript portion themselves; but this would also mean that they would have to pay for it themselves. Second, they could bring on a motion in this court to compel the plaintiff to order (and thus to pay for) the designated portions.

To the best of this court's knowledge, the defendants did not exercise either of their options. I can say with confidence that no motion to compel the plaintiff to order portions of the transcripts was ever noticed in this court. Given that the defendants never took the appropriate procedural steps to compel plaintiff to order their portions of the transcript, the plaintif motion is an unnecessary response to an (as yet)

non-existent problem. Plaintiff's motion to compel the defendants to pay for their own transcript on appeal (if such a motion is before this court) must be denied for it does not concern any presently justiciable controversy.

VIII

Accordingly, the court ORDERS that:

1. The defendants' motion for judgment notwithstanding the verdict is timely and may be considered by this court;

2. The plaintiff's motion for a new trial on the issue of damages is untimely and must be denied;

3. The plaintiff's motion for attorney's and paralegal's fees is. imely and said motion is hereby granted. The plaintiff is awarded attorney's and paralegal's fees in the amount of $45,383.17;

4. The plaintiff's bill of costs is denied; and

5. The plaintiff's motion to compel the defendants to pay for their own transcript on appeal is denied.

IT IS SO ORDERED.

DATED: December 6, 1985

LAWRENCE K. KARLTON
U.S. District Judge

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SACRAMENTO)

GINA MORANDI, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814. On December 11, 1985 (Date) I served the attached

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS/SUPPLEMENTAL APPENDIX C AND D

in said cause, by placing 3 true copy(ies) thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

JACK JACOBSON, ESQ.
1211 Pacific Ave.
Santa Cruz, CA 95060

Gina Morandi
AFFIANT

Subscribed and sworn to before me this 11th day of December, 19 85.

DEBORAH ARMSTRONG
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My commission expires Aug. 7, 1989

Deborah Armstrong
Notary Public in and for said County and State

ASM

(8/84)

Supreme Court, U.S.
FILED
JAN 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-908

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR,

Petitioners,

vs.

FRANK HAYGOOD,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

JACK JACOBSON
1211 Pacific Avenue, Suite 8
Santa Cruz, California 95060
Telephone: (408) 429-1587

Attorney for Respondent

68pp

QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT PROPERLY APPLIED LOGAN V. ZIMMERMAN BRUSH COMPANY TO A CASE INVOLVING INTERFERENCE WITH A LIBERTY INTEREST.

2. WHETHER PETITIONERS WERE ENTITLED TO A QUALIFIED IMMUNITY AS A MATTER OF LAW.

3. WHETHER AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE.

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No. 85-908

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and BENJAMIN SEYMOUR,	)
Petitioners,	)
vs.	)
FRANK HAYGOOD,	)
Respondent.	)

IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE NINTH CIRCUIT
COURT OF APPEALS

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent FRANK HAYGOOD respectfully prays that this court not issue a writ of certiorari to review the judgment.

* * * * *

OPINIONS BELOW

In addition to the lower court's opinions attached to petitioners' petition and supplemental appendix, respondent attaches to this opposition to certiorari the trial court's pre-trial memorandum of January 5, 1978. A copy of the relevant portions of this memorandum is attached hereto as Appendix A.

JURISDICTION

The brief for opposing the petition for writ of certiorari is filed within the time period extended by this court in its letter of December 9, 1985 in accordance with Rule 22 and Rule 29(1) of the Rules of the Supreme Court of the United States. This court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

The Civil Rights Act of 1871 (42 U.S.C. Section 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof tc the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The Civil Rights Act of 1964 (42 U.S.C. Section 1988) provides:

> In any action . . . of Section 1983 of this title, the court, in its discretion may allow the prevailing party. . . a reasonable attorney's fee as part of the costs.

ATTORNEY'S FEES AND COSTS

Respondent seeks costs and attorney's fees for this action under 42 U.S.C. Section 1988 and Rule 50 of the United States Supreme Court.

STATEMENT OF THE CASE

Respondent agrees with petitioners' statement of the case.

STATEMENT OF FACTS

Respondent, FRANK HAYGOOD, former prisoner of the State of California, originally filed a complaint under 42 U.S.C.

Section 1983, 1985(3), 1986, for damages and under 28 U.S.C. Sections 2201 and 2202 for declaratory relief. Respondent also appended a claim for damages for false imprisonment, a tort under state law (CD 1). The original defendants were Attorney General of the State of California, the Director of Corrections of California, various members of the California Adult Authority, the California Adult Authority, the Administrative Officer of the Adult Authority, the Warden of Folsom Prison, the Records Officer of Folsom Prison, a Correctional Counselor at Folsom Prison, and a Records Officer for the Department of Corrections.

Respondent was, in 1946, convicted of escape and sentenced to State prison for an indeterminate term not to exceed ten years. That term, designated his "O" term by the Department of Corrections, was completely discharged on June 29, 1953.

In 1949, respondent was convicted of five counts of forgery, and was sentenced to concurrent terms of imprisonment of from one to fourteen years on each count. Those terms were designated respondent's "A" terms by the Department of Corrections, and was concurrent to his "O" term. Commencement of the "A" term began on April 1, 1949. If this term of imprisonment had not been interrupted, respondent would have served the maximum number of years on this term on April 2, 1963.

However, in 1956, respondent was convicted of carrying a concealed weapon in violation of Penal Code Section 12021, and was sentenced to state prison for an indeterminate term not to exceed five years. This term was concurrent to the previously imposed terms and commenced on April 25, 1956. This term was designated respondent's "B" term by the Department of Corrections.

If this term had not been interrupted, re
spondent would have served the maximum num
ber of years on this term on April 26, 196

However, on or about December 21
1958, respondent escaped from custody whil
serving his "A" and "B" terms. While a
large, he committed a robbery, and was con
victed of this offense on January 5, 195
He was sentenced on the robbery convictio
to an indeterminate life term, designate
his "C" term of the Department of Correc
tions. Service of the "C" term began o
January 8, 1959. This term was concurren
to the "A" and "B" terms.

Subsequently, on or about Apri
14, 1959, respondent entered a guilty ple
to a violation of the then-existing provi
sions of Penal Code Section 4531 (escape)
and was sentenced to an indeterminate lif
sentence with a one-year minimum, said ter
"to run at the time he would otherwise hav

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been discharged". This term was designated respondent's "D" term by the Department of Corrections.

Upon his return to prison in 1959, respondent's "D" term (escape) was determined to be consecutive not only to his "A" and "B" terms, but also to his "C" term.

In conjunction with the granting of parole, the Adult Authority, on October 8, 1970, fixed respondent's "C" term (robbery) at ten years and his "D" term (escape) at five-and-one-half years. Respondent was given a final discharge date on all his terms on July 8, 1974. Because the October 8th action fixed the "C" term at less than the time already served, an "administrative discharge" was recorded, effective retroactively to January 8, 1969. Although respondent had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961 respectively, the Adult Authority

continued to refer to those terms in accordance with the Department of Corrections' "Continuous Term Policy", instead of applying Penal Code Section 4531 (escape).

Subsequently, on respondent's return to prison in 1973, the Adult Authority revoked respondent's parole and refixed his "A", "B", "C" and "D" terms at their maximum. He was transferred to Folsom Prison in December 1973.

Soon after his arrival at Folsom, MR. HAYGOOD received a slip of paper from the Adult Authority notifying him of his legal status. Respondent said he became upset with this form because he thought it indicated that he was still serving time on his "A" and "B" terms, as well as on his "C" term. Respondent also thought that the form indicated that he had not yet been credited with serving any time on his "D" term. (RT Vol. II, p. 391). Respondent's legal ad-

visor PHILIP GASKILL, after looking at the form, thought that MR. HAYGOOD was being illegally detained (RT Vol. II, p. 289).

Defendant WIPF was a Correctional Counselor I at Folsom State Prison. WIPF met with respondent on at least five occasions and possibly more to discuss MR. HAYGOOD'S concern about his sentences. Respondent sent three letters to WIPF concerning his terms of imprisonment. MR. HAYGOOD told WIPF that he felt he was being illegally detained (RT Vol. II, p. 447). WIPF also discussed respondent's concerns with defendant/petitioner, CRANKE. Defendant/petitioner, CRANKE, was a Records Officer II at Folsom State Prison. The duties of a records officer are described in an exhibit which was introduced into evidence and read to the jury at trial.

These duties include reviewing, defining, and recording terms and sentences

shown in commitments; interpreting and applying Adult Authority actions as they relate to custody and release; performing computations or supervising the making of computations necessary to determine the legal date of parole and discharge for inmates; serving as an expert witness in legal proceedings.

On or about March 4, 1974, respondent sent a letter to MR. CRANKE regarding his sentences. MR. CRANKE acknowledged receiving the letter. This letter complains that the Adult Author-ity placed him back on all of his terms ("A", "B", "C" and "D") at the maximum and allowed him no credit for time served on the one to life sentence ("D" term). He asked, "How can this be possible???" He also complains that the answers he received from MR. WIFF were not satisfactory to him. (RT Vol. II, pp. 295-296).

MR. CRANKE read the letter and then reviewed respondent's central file which included the legal status form, the cumulative case summary, the abstracts of judgment, and copies of the sentencing proceedings. MR. CRANKE then determined that respondent's concerns about his sentence could best be answered by referring him to the continuous term policy which was set forth in two specific Attorney General's opinions (RT Vol. III, pp. 588-590, 606; RT Vol. II, p. 274). He then sent MR. HAYGOOD a short reply to this effect.

Defendant, JOSEPH A. SPANGLER, was the Administrative Officer of the California Adult Authority.

On March 8, 1974, respondent sent a letter to defendant SPANGLER regarding his sentences MR. SPANGLER did not recall receiving this letter, did not personally investigate respondent's allegations, and

did not receive any written or oral reports once he had directed MR. SEYMOUR to respond to respondent's letter (RT Vol. II, pp. 274-275).

In this letter, respondent, after explaining his sentences and what he perceived to be in error, stated:

> "Under the statutory provisions of the California Penal Code Sections 2940, 2941, 3021, 3023, and 4531 (repealed by Stats. 1963), I am being illegally detained by the Department Corrections in violation to said sections as well as the California and United States Constitutions." (emphasis added). (RT Vol. II, pp. 300-304).

Defendant/petitioner, BENJAMIN F. SEYMOUR, was a Records Officer III for the California Department of Corrections. The duties of a Records Officer III are described in an exhibit which was introduced into evidence at trial. In addition to those duties contained in the job description for a Records Officer III, a Records Officer

III's duties include: determining legal status for parole and discharge dates for inmates; analyzing inmate records and recognizes discrepancies and irregularities (RT Vol. II, pp. 319-320).

MR. SEYMOUR received respondent's letter dated March 8, 1974, which had been addressed to MR. SPANGLER. He reviewed respondent's central file, including the cumulative case summary, legal status form, Attorney General opinions, and spoke with MR. CRANKE to confirm MR. HAYGOOD'S legal status (RT Vol. III, pp. 612-614, 623-624; RT Vol. II, p. 275).

On April 1, 1974, MR. SEYMOUR sent a short letter to MR. HAYGOOD again merely referring him to Attorney General's opinions that did not apply to respondent's complaints. (RT Vol. II, p. 308).

Respondent was not satisfied with either MR. CRANKE'S or MR. SEYMOUR'S re-

sponse and on July 25, 1974, he filed a proper petition for a writ of habeas corpus in the California Supreme Court (plaintiff's Exhibit 15). The issue originally presented was whether the Department of Corrections lost jurisdiction over respondent when he was "presently confined and not receiving any credit for time being served". (RT Vol. II, pp. 309-310).

In the case of In re Haygood, 14 Cal.3d 801 (1975), the California Supreme Court determined that the refixing of respondent's terms was erroneous, and accepted respondent's contention that the "D" term was consecutive only to the "A" and "B" terms and was concurrent with the "C" term. Thus, the "C" term expired on January 8, 1969, as determined by the Adult Authority action of October 8, 1970, fixing it at ten years. Based on the action of the same date fixing the "D" term at five-and-one-half

years, the "D" term expired in late 1968, since it commenced from the date respondent would otherwise have been discharged from the "A" and "B" terms, since these were the terms he was serving at the time of his escape. In essence, therefore, the Supreme Court reasoned that the Adult Authority's actions on October 8, 1970, effectively terminated all of respondent's term, and he was entitled to be released by writ of habeas corpus (RT Vol. II, p. 361).

REASONS FOR DENYING THE PETITION

I

PETITIONERS ACTED PURSUANT TO AN ESTABLISHED STATE POLICY

Petitioners argue that the application of the continuous term policy to HAYGOOD'S sentences did not violate his due process rights. They support this contention by citing an unchallenged ruling of the

District Court. A close reading of this pre-trial ruling reveals their argument is without foundation.

Judge McBride stated in his memorandum:

> "For purposes of the motion to dismiss only, defendant Procunier, states that, even if it can be assumed that he adopted a policy whereby all consecutive sentences were to be considered as one continuous term, this policy caused no harm to the plaintiff and, consequently, the complaint fails to state a claim on which relief can be granted." (CD 19, Order 1/5/78), page 6). (emphasis added). (See attached Appendix A).

This ruling was for a single defendant who was dismissed from this action. That ruling was not based on any evidence before the court at that time. Some three years later at the trial of this matter, substantial evidence was presented that the continuous term policy (an established state procedure) was applied to respondent's terms

of imprisonment.

Petitioners HAROLD CRANKE and BENJAMIN SEYMOUR and their witness, JEAN BRISCOE, all records officers, admitted they felt they had only to determine respondent had a consecutive sentence. Once so determined, they simply applied the continuous term policy without further investigation. (Testimony of JEAN BRISCOE, RT Vol. III, p. 528, lines 16-18; p. 547, lines 1-3; p. 565, lines 4-8, See attached Appendix B-1; Testimony of HAROLD C. CRANKE, RT Vol. III, p. 592, lines 7-13; p. 601, lines 12-25, See attached Appendix B-2; Testimony of BENJAMIN SEYMOUR, RT Vol. III, p. 615 lines 2-6; p. 630, lines 6-8, See attached Appendix B-3).

In fact, JEAN BRISCOE testified that after the California Supreme Court issued the decision in In re Haygood, 14 Cal.3d 801 (1975), every state inmates' records were reviewed to determine whether any

escape sentence was being misapplied. (RT. Vol. III, p. 546, lines 1-6, see attached Appendix B-1).

Petitioners, in fact, requested that a continuous term policy instruction be given to the jury. Judge KARLTON refused to instruct the jury that this policy did not injure plaintiff. (RT. Vol. III, pp. 581 and 582, see attached Appendix B-4). In fact, the jury was charged that respondent "was subjected" to this policy in that his "D" term ran consecutive to all three terms instead of only the "A" and "B" terms. (RT Vol. III, p. 698, lines 5-14. See attached Appendix B-5).

Based on the testimony of petitioners and their witness, the trial court overruled the January 5, 1978 pre-trial order and charged the jury that petitioners' application of the continuous term policy injured respondent.

Based on the application of an established state policy to respondent's terms of imprisonment, the Ninth Circuit en banc court's holding that Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) applies rather than Parratt v. Taylor, 451 U.S. 527 (1981) was proper.

II

PARRATT V. TAYLOR DOES NOT APPLY TO NEGLIGENT DEPRIVATIONS OF RESPONDENT'S LIBERTY INTERESTS

A. Parratt v Taylor Does Not Apply To Liberty Interests

Should this court decide that Logan v. Zimmerman Brush Co., (supra) does not apply to the instant case, petitioners have asked this court to apply Parratt v. Taylor.

In Parratt v. Taylor, this Court held that the existence of a state tort remedy for the negligent deprivation of a prisoner's property satisfies the due process clause of the consitution. Circuit

courts are divided on the question of wheth-
er Parratt applies to deprivations of
liberty interests. Compare Brewer v. Black-
well, 695 F.2d 387, 394-95 (5th Cir. 1982)
(Parratt does not apply to deprivations of
liberty) to Ellis v. Hamilton, 669 F.2d 510,
515 (7th Cir.) cert. denied, 103 S. Ct. 488
(1982). The issue is unsettled in the Ninth
Circuit. Compare Rutledge v. Arizona Board
of Regents, 660 F.2d 1345 (9th Cir. 1981),
aff'd on other grounds sub nom. Kush v. Rut-
ledge, 103 S. Ct. 1483 (1983) with Wakineko-
ma v. Olim, 664 F.2d 708 (9th Cir. 1981),
(Parratt does not apply).

Rutledge however is different than
the instant case in that the plaintiff in
Rutledge chose redress in the state courts
where respondent in the instant case chose
redress in the federal court. The court in
Rutledge at page 1352 states;

> "In the instant case, since appellant has sought redress in the Arizona State Courts, and in the absence of suggestion that the post-deprivation procedures under state law are deficient, we must conclude that the alleged deprivation was not without due process of law." (emphasis added).

The plaintiff in Rutledge acknowledged that the state remedy was sufficient in that he sought redress in the state courts.

In the present action, respondent alleges, as was held by Judge Karlton in his decision, that the tort action provided by the state does not satisfy due process when what was required was respondent's timely release. Parratt requires a hearing before the claimant is finally deprived of his interest. His due process right is the right to be released from prison when his lawfully fixed term of imprisonment expired. McNeil v. Patuscent Institutions Director, 407 U.S. 245 (1972); Johnson v. Mueller, 415

F.2d 354 (4th Cir. 1969); Speaks v. McGregor, 355 F. Supp. 1129 (W.D. Va. 1973).

The Ninth Circuit refused to apply Parratt in Wakinekoma v. Olim, (supra), by pointing out that Justice Blackmun's concurrence, which Justic White endorsed, limited the case to property issues. It stated at 664 F.2d at 714 that cases "dealing with a liberty interest [are] of a wholly different nature" than those involving property. The Fifth Circuit in Brewer v. Blackwell, (supra), also refused to apply Parratt to liberty interests and relied on the narrow reading given Parratt by the Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt 692 F.2d at 394-95; see 455 U.S. at 436. Although petitioners fail to acknowledge it, "property interests" are wholly different than "liberty interests".

B. The Distinction Between "Property" and "Liberty" is The Inability To Compensate For "Liberty" Violations Once They Occurred

Petitioners argue that there is no factual or legal basis for distinguishing between property and liberty issues with respect to the application of Parratt where negligent conduct is the basis of respondent's claim. There is no question that when a deprivation is caused by negligence there can be no pre-deprivation hearing because negligence is unforeseen. But the interest deprived is the distinction. There is a great deal of difference between a "property interest" and a "liberty interest". Justice White in his dissent in the case of Ingraham v. Wright, 430 U.S. 651, 695 (1977) correctly points out that tort actions available to correct violations of liberty are inadequate. These later court

actions occur "after the punishment has been finally imposed. The infliction of physical pain is final and irreparable, it cannot be undone in subsequent proceedings". Justice White then makes the similar argument made by Judge Karlton in his November 30, 1981 opinion when he argues that;

> "The majority's conclusion that a damages remedy for excessive corporal punishment affords adequate process rests on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent. The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for unlawful imprisonment. Similarly, the State could finally take away a prisoner's good-time credits for alleged disciplinary infractions and require him to bring a damage suit after he was eventually released."

Justice Stevens in his dissent in Ingraham made a special point of focusing on

those situations in which post-deprivation remedies would be "constitutionally sufficient" (430 U.S. at 701). He wrote;

> "When only an invasion of a property interest is involved, there is a greater likelihood that a damage award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be all the process that the fourteenth amendment requires."

See also Bonner v. Coughlin, 517 F.2d 1311, 1318-30 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978).

C. Respondent's Due Process Required That His Liberty Be Restored To Him At the Precise Moment Fixed By State Law

Petitioners argue that because California has a tort claims statute under which respondent could have sued, he is

foreclosed from bringing this section 1983 action in the federal courts. In other words, the only process due to respondent is an action under the California Torts Claim statute.

Judge Karlton disposes of this argument in his published November 30, 1981 opinion by making a distinction between the right guaranteed to the respondent by the due process clause, and the remedy which is available to him if that right is breached. (See pp. 10-11 of Exhibit C of petitioners' supplemental appendix). He states that the efficacy of a post-deprivation hearing to remedy the injury is pertinent, and is a factor in considering whether due process has been accorded; it is not the relevant factor in this present case. He further stated that we must look to the precise nature of the governmental function involved, as well as the private intrest

that has been affected by goverenmental action to determine what procedural due process may require under any given set of circumstances. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Morrisey v. Brewer, 408 U.S. 471, 481 (1972). He finds that respondent was entitled to have his liberty restored to him at the precise moment fixed by state law. In Parratt, the plaintiff's interest was solely to receive his property and a post-deprivation hearing would suffice since that process would restore the equivalent of property - money. Money is not the equivalent of liberty.

A hearing after respondent was released would not be enough in that Parratt requires a hearing before the claimant is finally deprived of his interest. 101 S. Ct. at 1908. "Once liberty is gone it can never be recovered. Money is compensation

for liberty denied; money is not liberty itself." The Tort action provided by the state does not satisfy due process when what was required was the timely release of respondent.

He further states that petitioners' argument suggests:

> ". . . that government officials are permitted under the Due Process Clause to incarcerate individuals for any reason at all as long as the state later pays those individuals for their lost time." p. 12.

That reduction ad absurdum illustrates that what is at issue here is the notice of the consitutional right guaranteed. The effect of these guarantees is to set a standard of conduct for government officials. It must be clear what standards are required, not just what the remedy is for the occasional breach.

Petitioners' argument is also inconsistent with applicable precedent in that

they are proposing that respondent must exhaust state remedies before bringing a Section 1983 action based on due process simpliciter. That proposal ignores two decades of case law, as well as the history of the statute itself. (See Monroe v. Pape, 365 U.S. 167, 183 (1961). See also Comment, Actionability of Negligence under Section 1983 and the Eighth Amendment. 127 U. Penn. L.R. 533, 554-555 (1978).

Petitioners argue that this case is simply an instance in which the proper authorities understood the California law of indeterminate sentences in a fashion subsequently determined to be incorrect by the Supreme Court of California on a six to one vote. This is simply not the case. Petitioners followed the normal procedure of the Adult Authority and applied the consecutive sentence policy to respondent's terms of imprisonment. Once they received respon-

dent's complaints, a duty arose whereby they were obligated to investigate respondent's individual terms of imprisonment and current California law. The California Supreme Court did not change the then applicable laws. In In re Haygood, (supra), they merely pointed out that the California Adult Authority's consecutive sentence policy was not properly applied to respondent's case. Petitioners admitted at trial that the only investigation that was made was whether respondent was serving consecutive sentences. The law was not determined to be incorrect, it was simply not applied properly to respondent. The process due to respondent was his immediate release, upon putting petitioners on notice. A jury has already determined that petitioners failed in their duty.

III

SINCE PETITIONERS WERE "DELIBERATELY INDIFFERENT" TO RESPONDENT'S NOTICE OF VIOLATIONS OF AN ESTABLISHED RIGHT, THEY ARE NOT ENTITLED TO A QUALIFIED IMMUNITY DEFENSE

On the motion for judgment notwithstanding the verdict, the trial judge held that there was sufficient evidence from which the jury could have found that petitioners intended to punish respondent by their actions. Haygood v. Younger, 527 F. Supp. at 819, 821-822. There was credible evidence from which the jury could have found that the petitioners, after being put on notice, simply refused to investigate a computational error. Haygood v. Younger, (supra at 823). Thus, as the en banc court found, there was adequate evidence from which the jury could have found liability under the appropriate standard of "deliberate indifference". Haygood v. Younger, 769 F.2d at 1355 (9th Cir. 1985). Petitioners

do not here challenge the court's ruling that respondent's unlawful incarceration constituted cruel and unusual punishment in violation of the Eighth Amendment. As the Ninth Circuit found in Albers v Whitley, 743 F.2d 1372 at 1377 (9th Cir. 1984), cert. granted, ___ U.S. ___, 105 S. Ct. 2700 (1985), a finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. The petitioners did not need the benefit of the California Supreme Court's 1975 ruling as petitioners argue in their brief. Had petitioners not been deliberately indifferent and performed their duties to investigate respondent's allegations, they would have discovered that under the provisions of California Penal Code Section 4531 (since repealed), the computation of respondent's terms of imprisonment were erroneous.

As this court finds in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); "Where an official could be expected to know that certain conduct would violate statutory or consitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action".

It is absurd to assert that any official may simply close their eyes and ears to the assertions of violations of established laws and constitutional rights and thus be shielded from liability.

IV

THE NINTH CIRCUIT DID NOT ERR IN SUSTAINING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES

A. There Is No Requirement Under 42 U.S.C. Section 1988 That Attorney's Fees Must Be Proportionate To The Recovery In Order To Be Reasonable

Judge Karlton in his unpublished order of November 30, 1981 applied the 12 factors set forth in Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), Cert. denied sub non. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976) in awarding respondent attorney's fees. (see petitioners' supplemental appendix D).

As the Ninth Circuit has made clear, the star which must guide this court in exercising its discretion is the purpose underlying 42 U.S.C. Section 1988. ". . . Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Award Act must be liberally construed to achieve these ends. 'In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies

available to achieve the goals of our civil rights laws.'" Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (quoting S.Rep.No. 94-1011, 94th Congress, 2d Sess., 3 reprinted in [1976] U.S. Code Cong. & Ad. News 5910). The approach suggested by petitioners could effectively preclude former prisoners and other "unsympathetic plaintiffs" from litigating constitutional claims, for attorneys could not risk the necessary months and years of work on what could turn out to be an insignificant damages verdict. This result cannot be squared with the broad remedial purposes of the statute. The statute is not designed to reward attorneys for winning high verdicts; it is meant to encourage them to sue on meritorious consitutional claims.

/ / /

B. The Amount Of The Recovery Was Taken Into Account By The Trial Court In Determining The Award Of Attorney's Fees

Although the case of Hensley v. Eckerhart, 461 U.S. 424 (1983) had not been decided at the time of the trial courts order awarding attorney's fees, the rationale behind Hensley had been followed. Hensley requires that the lower court consider the amount of the attorney's fee award in light of the success achieved by the plaintiffs. The trial court in the instant case drastically reduced the lodestar figure by 65% as a result of the amount of damages obtained by respondent. (see petitioners' supplemental appendix D, p. 63).

C. Attorney's Fees (Under Section 1988) Should Be Granted To The Prevailing Attorney Without Regard To The Amount of Damages

The jury in the present case had

to consider awarding damages to respondent who had served over twenty years of imprisonment for various crimes. The damages they were awarding were for only the last seventeen months of his incarceration. These damages were being assessed against two retired records officers with a lifetime history of service to the State of California.

By reducing the attorney's fee award proportionately to the result obtained, former prisoners and other "unsympathetic plaintiffs" would be effectively foreclosed from litigating consitutional claims. Private attorneys could not risk the months and years on a case that may turn out to be of low monetary damages. The constitutional violations involved would be left unchallenged.

In the present case, the trial court determined that ". . . the issues pre-

sented were sufficiently fresh and important." (petitioners' supplemental appendix B, p. 42). ". . . he proved that he had been deprived of his constitutional rights and that the defendants had caused that deprivation. . ." (p. 47). ". . . this case involved novel and extremely complex issues regarding the nature of the statute under which it was brought (42. U.S.C. Section 1983), and the state of mind requirements (if any) implied into the plaintiff's cause of action by the underlying consitutional claims. In addition, the case involved complicated issues regarding the immunities from suit claimed by various defendants. In several respects, this case presented issues that are at the frontier of civil rights litigations." (p. 54). "Similarly, the claim that 'plaintiff's action conferred no great benefit on society nor did it establish a precedent which would affect large

numbers of people misses the mark. To begin with, we have the testimony offered by the defendants' witness to the effect that no other records officers would have done more than defendants did to investigate the plaintiff's meritorious claim that he was entitled to be released. One hopes that this lawsuit will have some impact on the standard of conduct of officials who are charged with releasing prisoners whose sentences have run. Furthermore, the issues raised in this litigation were sufficiently fresh and important that this court thinks it worthwhile to publish its conclusions. Whether that precedent will "affect large numbers of people" remains to be seen". (p. 42).

These issues were novel enough and complex enough for the Ninth Circuit to hear them "en banc". The issues presented and resolved in this case are a great benefit to

the evolution of civil rights law.

This case is more like Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891, 104. S. Ct. ___ (1984) than City of Riverside v. Rivera, 763 F.2d 1580, cert. granted No. 85-224 October 1985 in that attorney's fees were granted to compensate for the complexity and novelty of the issues and the great benefits achieved.

The intent of the legislators in enacting 42 U.S.C. 1988 was to encourage "private attorney generals" to pursue compliance with the Civil Rights Act. "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorney's compensated by a paying client, for all time reasonably expended on the matter". (emphasis added) U.S. Code Cong. & Ad News 5913 (supra).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

JACK JACOBSON
Attorney for Respondent

JJ/ih

APPENDIX A

An examination of plaintiff's complaint reveals that other constitutional rights are, in fact, identified; plaintiff asserts violation of his right against cruel and unusual punishment and his right not to be placed twice in jeopardy, among others. Even if plaintiff did not specifically identify particular constitutional rights that have allegedly been violated, this court could not dismiss this complaint. The court is under a duty to examine the complaint to determine if the allegations provide for relief under any possible theory; the complaint should not be dismissed even if plaintiff cites a theory or a purported violation of a constitutional right which cannot stand scrutiny, so long as the factual allegations will support a claim for relief under another theory. 5 Wright & Miller, Federal Practice and Procedure:

Civil Section 1357 at 602; United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963). Since plaintiff has set forth some facts which would support his claims of constitutional violations, defendant's motion to dismiss is denied insofar as it is based on plaintiff's failure to identify the constitutional rights allegedly violated.

(2) Lack of Harm to the Plaintiff

For purposes of the motion to dismiss only, defendant Procunier states that, even if it can be assumed that he adopted a policy whereby all consecutive sentences were to be considered as one continuous term, this policy caused no harm to the plaintiff and, consequently, the complaint fails to state a claim on which relief can be granted.

In effect, the continuous sentence policy provided that "no one of the prison-

er's consecutive sentences may be deemed satisfied until the whole of such aggregate term has been served." 19 Ops. Cal. Att'y Gen. 23, 28 (1952). Plaintiff asserts in his complaint that this

> policy prohibited the issuance of a discharge for a completed term of imprisonment until such a time when all other commitments were completed. This policy had and was continuing to deny plaintiff discharges from "A", "B" and "C" terms, and by further allowing said terms of imprisonment to exceed the maximum terms as fixed by law or refixed by defendant [Adult Authority members].

It appears indisputable that the continuous sentence policy had the effect of denying plaintiff a discharge on terms of imprisonment for which he had served the maximum. The California Supreme Court stated:

> Although its records reflect no discharge from the "A" and "B" terms, but instead indicate service of more that 23 years on the 14-year maximum "A" terms [sic] and 18 years on the 5-year

> maximum "B" term, before this court respondent concedes that the maximum duration of the "A" and "B" terms was approximately April 1963 and May 1961, respectively. The Department of Corrections and the Adult Authority should, therefore, correct their records accordingly to reflect petitioner's discharge from the "A" and "B" terms.

In re Haygood, supra, at 806. The California Supreme Court ruled that plaintiff was entitled to be discharged on both the "C" and "D" terms because plaintiff had served the 10 years which the Adult Authority fixed as the term on the "C" term and because the "D" term could only be consecutive to the "A" and "B" terms under the sentence imposed.

Plaintiff's injury is that he was held in prison after the expiration of his terms. This injury resulted, not from the operation of the continuous sentence policy, but from the Adult Authority's error in treating the

"D" term as consecutive to the "C" term, when in fact it was consecutive only to th "A" and "B" terms.[1/] Thus, the continuous sentence policy was not the cause of plaintiff's injury, to the extent that his injury is limited to the time spent in prison after he should have been released.

Plaintiff, however, does not limit his allegations of injury merely to the imprisonment after the expiration of his terms. The complaint appears to allege injuries deriving from the fact that discharges were not entered on the "A" and "B" terms when he had served the maximum sentence; plaintiff assets mental distress,

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1/ The "D" term was consecutive only to the "A" and "B" terms because the sentencing judge ruled that the "D" term would commence at the time plaintiff would otherwise be released, that is the time at which he completed serving the sentences on which he was in prison at the time of his escape.

emotion and physical distress, damage to his reputation and his employment and economic opportunities, and cruel and unusual punishment. It may be that the anxiety arising from the failure to enter form discharges could amount to cruel and unusual punishment; plaintiff may have feared that the "A" and "B" terms were to be kept alive and that he might be held in prison on one or both of those terms after the expiration of his "C" and "D" terms. If so, plaintiff has stated a claim for relief under section 1983. In any event, defendant Procunier has failed to meet his burden in showing that he is entitled to dismissal on the ground that plaintiff has suffered no harm.

(3) Constitutionality of the Continuous Sentence Policy

Defendant Procunier makes two arguments that the continuous sentence policy was con-

stitutional and, consequently, that plaintiff has failed to otate a claim on which relief can be granted under section 1983. Defendant argues first that the policy did not discriminate against the plaintiff because it was applied to all prisoners. Second, defendant states that plaintiff had no right to notice and opportunity to object either to the adoption of the policy or to its application in his case and so that there was no constitutional defect in the adoption and application of the policy.

APPENDIX B

A P P E N D I X B-1

Testimony of Jean Briscoe

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RT. Vol. III, p. 528, lines 16-18:

Q: With regard to Mr. Haygood's sentences, did the continuous term policy apply to his case?

A: It did.

RT. Vol. III, p. 547, lines 1-3:

Q: Now you stated that continuous term policy applied to Mr. Haygood's case; is that correct?

A: That's correct.

RT. Vol. III, p. 565, lines 4-8:

A: Under the continuous term policy with the term subject to fixed and refixed by the Adult Authority when he was returned as a violator, his term was refixed at maximum on the "C" term and, therefore, it would record as having no time done on the "D" term.

RT. Vol. III, p. 546, lines 1-6:

A: In re: Haygood was a California Supreme Court opinion and it therefore became case law. The Department of Corrections headquarters office published the interpretations of that opinion, and we went through every file at Folsom Prison, as they did throughout the State, to review -- to see that provisions of Haygood were complied with in all cases.

A P P E N D I X B-2

Testimony of Harold C. Cranke

RT. Vol. III, p. 592, lines 7-13:

Q: The Attorney General's opinions to which you cited to Mr. Haygood, did they deal with the coninuous term policy?

A: They did.

Q: And you included those because -- or based on your belief that the continuous term policy applied to Mr. Haygood's case?

A: That's right.

RT. Vol. III, p. 601, lines 12-25:

Q: Didn't Mr. Haygoood in his letter tell you that they reached that time?

A: They hadn't reached that time.

Q: Didn't he tell you that he was serving more time on those terms than was possible?

A: They were all tied together by his consecutive term and none of them could actually be discharged until he had served out his "D" term.

Q: Why wasn't he discharged on all three -- "A", "B", and "C" terms?

A: Because they were tied to the "D" term.

Q: You've read 4531, isn't it consistent that they would be discharged?

A: No, sir.

A P P E N D I X B-3

Testimony of Benjamin Seymour

RT. Vol. III, p. 615, lines 2-6:

Q: Did you feel after reviewing the material that you looked at and after looking at Mr. Haygood's letter, that the continuous term policy had any application of Mr. Haygood's case?

A: I felt it did.

RT. III, p. 630, lines 6-8:

Q: BY MR. JACOBSON: My question is, why wasn't Frank's "A", "B", "C" terms discharged?

A: Because of the continuous term policy.

A P P E N D I X B-4

Judge Karlton

Do you have any further, Mr. Prahl?

MR. PRAHL: We do, your Honor.

THE COURT: You may set them out.

MR. PRAHL: With regard to the instruction offered by defendants regarding the continuous term policy, the Court had added a line reading, "Under this policy plaintiff's 'D' term was consecutive to his 'A' and 'B' terms, but not to his 'C' term." The Court has added that after line 12 of our proposed instruction.

The Court has stricken, "The plaintiff is this case was not injured by the application of the continuous term policy to his sentence."

THE COURT: This is correct.

MR. PRAHL: I believe we added to that, "To his sentence he did." And it should have been, "To his sentences." It is the defendants' contention that the prior ruling

by Judge McBride wherein this matteer that the application of the continuous term policy to plaintiff's case did not harm him: that the thing that harmed plaintiff in this case was the miscalculation in his term, and that this is now a matter of law and the jury is entitled to be apprised of this fact that in fact it was -- the question before them is not whether the application of the continuous term policy harmed him, but whether defendants are liable because they failed to discover that the "D" term had been erroneously determined to run consecutive to the "C" term. And by failing to instruct the jury that it was not the continuous term policy which harmed plaintiff, the jury will go into the jury room under the misapprehension that they can award damages, or the defendants may be liable on the application of the continuous term policy.

THE COURT: The Court is satisfied that the instruction as presented is misleading. We all agree, I think, that the issue is whether or not the continuous term policy was misapplied in this case. It is insufficient to say that the application of the continuous term policy, as an abstract matter, which is, of course, as I understand Judge McBride to have found, and quite properly in my view, did not harm the defendants. It is quite another thing to say as to the facts of this case under these circumstances the application did not harm, because it is plaintiff's theory of the case that it is the misapplication of the policy because it was made to run to a term occurring subsequent to the escape which resulted in the holding.

The objection is accordingly overruled. Next?

A P P E N D I X B-5

Jury Instruction

RT. Vol. III, p. 698, lines 5-14:

Under the laws of the State of California, a person who has received a prison sentence is regarded as serving one continuous term of imprisonment and under the laws of the State of California none of the terms terminate until the prisoner has served the last of the terms. This is known as the continuous term policy and plaintiff was subject to the continuous term policy. Under this policy plaintiff's "D" term was consecutive to his "A" and "B" term but not his "C" term.